Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

STUART G. YEOMAN, M.D.,
TIM HULSEY, M.D.,
JOE DAVIS, M.D., as President of the Warren County Medical Society, and
JOSEPH JANES, - - - - - - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY REVENUE CABINET,
KIM BURSE, in her official capacity as Secretary of the Kentucky Revenue Cabinet,
COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES,
FONTAINE BANKS, JR., in his official capacity as Secretary of the Kentucky Cabinet for Human Resources, and
THE KENTUCKY HEALTH CARE DATA COMMISSION, - - - - - - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

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September 16, 1994

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QUESTIONS PRESENTED

1. Whether the appointment by Kentucky Governor Brereton C. Jones of three (3) Special Justices to the Supreme Court of Kentucky to decide the state and federal constitutional validity of a statute which he drafted, for which he publicly lobbied, for which he called the Kentucky General Assembly into an extraordinary session, and which he publicly admitted constituted the highest priority of his administration, denied the Petitioners' due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Whether the selective "provider tax" provisions of Kentucky House Bill 1 violate the Petitioners' rights under the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

PARTIES TO THE PROCEEDING

All the parties to the within proceeding before the Court whose judgment is sought to be reviewed are named in the caption of this Petition as filed in this Court. CHARLES C. SMITH, JR., M.D., FRED L. BARNETT, M.D., WILLIAM B. MONNIG, M.D., and the KENTUCKY MEDICAL ASSOCIATION, who were Appellees in the case which was consolidated with the Petitioners' before the Court whose judgment is sought to be reviewed, have not been named in the caption of this Petition as filed in this Court.

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No.

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STUART G. YEOMAN, M.D.,
TIM HULSEY, M.D.,
JOE DAVIS, M.D., as President of the Warren County Medical Society, and
JOSEPH JANES, - - - - - - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY REVENUE CABINET,
KIM BURSE, in her official capacity as Secretary of the Kentucky Revenue Cabinet,
COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES,
FONTAINE BANKS, JR., in his official capacity as Secretary of the Kentucky Cabinet for Human Resources, and
THE KENTUCKY HEALTH CARE DATA COMMISSION, - - - - - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

The Petitioners, STUART G. YEOMAN, M.D., TIM HULSEY, M.D., JOE DAVIS, M.D., and JOSEPH JANES, respectfully pray that a Writ of Certiorari issue to review the Opinion of the Supreme Court of the Commonwealth of Kentucky entered in this matter on March 24, 1994. The Petition for Rehearing before the Supreme Court of the Commonwealth of Kentucky was denied on June 23, 1994.

This Petition is filed within ninety (90) days of the entry of the Order denying the Petition for Rehearing.

OPINIONS BELOW

The Order of the Franklin Circuit Court entered November 23, 1993, is reprinted in the Appendix to this Petition at pages 1a through 14a. The Order of the Supreme Court of Kentucky granting transfer from the Court of Appeals of Kentucky, entered December 16, 1993, is reprinted in the Appendix to this Petition at pages 15a through 16a. The Orders of Special Justices Ben S. Fletcher, III, R. Kent Westberry and Stephen C. Cawood, declining to recuse themselves from serving as Special Justices to the Supreme Court of Kentucky, dated February 16, 1994, are reprinted in the Appendix to this Petition at pages 26a through 28a. The Order of the Supreme Court of Kentucky refusing to order the Recusal of Special Justices Ben S. Fletcher, III, R. Kent Westberry, and Stephen C. Cawood, dated February 16, 1994, is reprinted in the Appendix to this Petition at pages 29a through 30a. The Opinion of the Supreme Court of the Commonwealth of Kentucky, entered March 24, 1994, is reprinted in the Appendix to this Petition at pages 31a through 49a. The Order of the Supreme Court of the Commonwealth of Kentucky denying the Petition for Rehearing, entered June 23, 1994, is reprinted in the Appendix to this Petition at page 50a.

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Section 1257.

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States:

THE FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE FOURTEENTH AMENDMENT, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. How the Federal Questions Were Presented.

The Federal Constitutional questions involved in the within case were presented both at the trial court level before the Franklin Circuit Court and before the Supreme Court of Kentucky, after the Governor of the Commonwealth of Kentucky appointed three (3) Special Justices to hear and decide the Respondents' appeal of the November 23, 1993 Order of the Franklin Circuit Court declaring Kentucky House Bill 1, enacted during the Second Extraordinary Session of the 1993 Kentucky General Assembly, unconstitutional and void under Sections 47 and 59 of the Kentucky Constitution. Before the Franklin Circuit Court, the Petitioners specifically alleged in their Com-

plaint and specifically argued that Kentucky House Bill 1, codified at Chapter 142 of the Kentucky Revised Statutes (Banks Baldwin, 1993), which, *inter alia*, imposed a two percent (2%) tax on the gross revenues of health care providers other than hospitals and specifically prohibited physicians and other providers from passing the two percent (2%) tax on to their patients, violated the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Before the Franklin Circuit Court, the Petitioners also specifically alleged in their Complaint and specifically argued that Section 4 of Kentucky House Bill 1, which imposed a tax on pharmacies and any other providers dispensing outpatient prescription drugs and which permits pharmacies, but not other providers, to pass the tax on to insurers or other health organizations with whom the pharmacies have entered into contracts for the provision of health care items or services, was violative of the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Before the Supreme Court of Kentucky, the Petitioners specifically raised and extensively briefed these same contentions which had been presented to the Franklin Circuit Court.

Before the Supreme Court of Kentucky, the Petitioners specifically alleged additional federal questions regarding the appointment by the Governor of the Commonwealth of Kentucky of three (3) Special Justices to the seven-member Supreme Court of Kentucky to hear and decide the Respondents' appeal of the adverse decision of the Franklin Circuit Court declaring Kentucky House Bill 1 unconstitutional on state constitutional grounds. On December 15, 1993, three (3) Justices of the Supreme Court of Kentucky, Justice Charles M. Leibson, Justice Thomas B. Spain, and

Justice Joseph E. Lambert, recused themselves from consideration of the Respondents' appeal, claiming conflicts of interest. See, *Notices of Recusal of Justices Joseph E. Lambert and Thomas B. Spain,* Appendix, pp. 17a-19a; *Order of Recusal of Justice Charles M. Leibson,* Appendix, pp. 20a-21a. Thereafter, Kentucky Supreme Court Chief Justice Robert F. Stephens, pursuant to Section 110(3) of the Kentucky Constitution, certified to Kentucky Governor Brereton C. Jones the recusal of Justices Leibson, Spain and Lambert. On January 6, 1994, Kentucky Governor Brereton C. Jones, who initiated and helped to draft Kentucky House Bill 1, called the Kentucky General Assembly into a Second Extraordinary Session to consider Kentucky House Bill 1, actively lobbied for its passage, and publicly commented upon the Petitioners' challenge to Kentucky House Bill 1, appointed three (3) Special Justices, all practicing attorneys, to the Supreme Court of Kentucky to hear and decide the merits of the Respondents' appeal. See, *January 6, 1994 Executive Order of Governor Brereton C. Jones,* Appendix, p. 22a. On February 1, 1994, the Petitioners filed their Motion in the Supreme Court of Kentucky seeking the recusal of the three (3) Special Justices appointed by Kentucky Governor Brereton C. Jones to decide the merits of the Respondents' appeal. Petitioners specifically alleged and argued in the Motion and the Affidavit of Stuart G. Yeoman, M.D. and Exhibits submitted therewith that the participation of the three (3) Special Justices appointed by Governor Jones to decide the merits of the Respondents' appeal denied the Petitioners' rights to due process of law in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States.

On February 9, 1994, one (1) of the three (3) Special Justices appointed by Governor Jones to hear and decide the merits of the Respondents' appeal, Special Justice Sheryl G. Snyder, declined the appointment as Special Jus-

tice to the Supreme Court of Kentucky, stating, *inter alia,* that "it is better for the Court and the Commonwealth that tangential issues be eliminated so that the public and the litigants can have confidence in the process by which the case is decided." See, *February 9, 1994 Letter of Sheryl G. Snyder to Governor Brereton C. Jones,* Appendix, pp. 23a-24a. On February 15, 1994, Kentucky Governor Brereton C. Jones appointed R. Kent Westberry, a private, practicing attorney, as Special Justice to the Supreme Court of Kentucky to replace Special Justice Sheryl G. Snyder and to decide the merits of the Respondents' appeal. See, *February 15, 1994 Executive Order of Governor Brereton C. Jones,* Appendix, p. 25a. On February 16, 1994, the Petitioners filed their Motion in the Supreme Court of Kentucky seeking the recusal of Special Justice R. Kent Westberry and renewing their Motion for the Recusal of Special Justices Stephen C. Cawood and Ben S. Fletcher, III. Petitioners again specifically alleged and argued that the participation of the three (3) Special Justices appointed by Governor Jones to decide the merits of the Respondents' appeal denied the Petitioners' rights to due process of law in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States. In their Petition for Rehearing filed in the Supreme Court of Kentucky on April 13, 1994, the Petitioners specifically alleged and argued these same contentions.

II. Statement of Facts

The Kentucky Medicaid Program is a joint Federal-State means-tested entitlement program designed to assist indigent and otherwise eligible citizens of Kentucky in obtaining medical care items and services from private physicians, hospitals, health maintenance organizations, nursing homes, and others. Nationally, Medicaid programs are established and administered by the states, including the Commonwealth of Kentucky, in accordance with fed-

eral statutes and regulations promulgated by the Health Care Financing Administration (HCFA). See, Title 42 U.S.C. §§1396, *et seq.* Physicians are not required to participate in the Medicaid program or treat Medicaid patients, and many choose not to do so. Kentucky's Medicaid Program is funded jointly by state and federal funds. The manner and amount of federal expenditures for Kentucky's Medicaid program are set forth in Title XIX of the Social Security Act, codified at Title 42 U.S.C. §§1396, *et seq.* The amount of federal expenditures is governed by a formula set forth in Title XIX of the Social Security Act, and the amount of federal expenditures for each state, determined according to this statutory formula, is termed "Federal Financial Participation" or "FFP".

On May 27, 1993, the Second Extraordinary Session of the 1993 Kentucky General Assembly enacted Kentucky House Bill 1 to fund a portion of Kentucky's Medicaid expenditures in order to receive FFP matching funds. Although it was not required to do so by either federal or state law, the General Assembly chose to tax health care providers to the maximum amount permitted by federal regulations. Kentucky House Bill 1 imposed a "provider tax" on three separate segments of the health care industry: (1) hospitals, (2) health care providers other than hospitals (e.g. physicians), and (3) pharmacies and others dispensing prescription drugs.

Section 2 of House Bill 1 imposed a tax on "all hospitals providing health care items or services or hospital services at a rate of two and one-half percent (2.5%) of the gross revenues received on or after July 1, 1993, for the provision of health care items or services or hospital services." Section 1(5) of House Bill 1 defined "hospital services" as all inpatient and outpatient services provided by a hospital, excluding the dispensing of prescription drugs on an outpatient basis by separately licensed hospital phar-

macies. Section 3 of House Bill 1 imposed a two percent (2%) tax on the gross revenues of health care providers other than hospitals, including physicians, regardless of their individual participation in the Kentucky Medicaid program. Section 5 of House Bill 1 specifically prohibited physicians and other health care providers from passing the two percent (2%) tax on to the recipients of the health care items or services.

Section 4 of House Bill 1 imposed a tax on pharmacies and any other providers dispensing outpatient prescription drugs at a rate of $0.25 per prescription upon outpatient prescription drugs for which delivery is taken in the Commonwealth of Kentucky on or after July 1, 1993. Section 4(1)(a) of House Bill 1 permitted pharmacies, but not other providers, to pass the tax on to insurers or other health organizations with whom the pharmacies have entered into contracts for the provision of health care items or services. Many Medicaid providers who do participate in the Kentucky Medicaid program, such as dentists, nurse midwives, nurse practitioners, chiropractors, taxi cabs and other transportation providers are not subject to the "provider tax" imposed by Kentucky House Bill 1.

Kentucky Governor Brereton C. Jones played the pivotal role in the development, drafting, lobbying for and enactment of what became Kentucky House Bill 1, specifically the provisions of Kentucky House Bill 1 imposing the two-percent (2%) "provider tax" upon the Petitioners herein. Governor Jones made numerous public statements regarding health care reform generally, and the imposition of the "provider tax" specifically, during his tenure as Lt. Governor of the Commonwealth of Kentucky, during his campaign for and tenure as Governor of the Commonwealth of Kentucky, and through the course of this litigation in the Kentucky courts. Indeed, Governor Jones even went so far as to comment specifically about this litigation in the pub-

lic media while this case was pending before the Kentucky courts. Numerous newspaper articles from the Louisville *Courier-Journal* revealed that Governor Jones made the "provider tax" at issue in this litigation the focal point of his number one political priority, health care reform in the Commonwealth of Kentucky.

As early as May, 1989, while he was Lt. Governor and the head of the Kentucky Health Care Access Foundation, Governor Jones endorsed a plan to "expand the Medicaid program to cover all uninsured Kentuckians with incomes less than the federal poverty line." *Motion for Recusal of Special Justices, Affidavit of Stuart G. Yeoman, M.D.*, Exh. 1, Louisville *Courier-Journal*, May 10, 1989.[1] At that time, Governor Jones acknowledged that such an extension of Kentucky's Medicaid program would "cost the State at least $210 million, and is 'totally impractical' in the current financial condition." *Id.* During his campaign for Governor, Governor Jones stated that "we're going to insist on reform, so that we can improve the quality of health care, hold down costs and expand coverage." *Motion, Aff.*, Exh. 2, *C-J*, October 2, 1991. As Governor-Elect, in November, 1991, Governor Jones stated that proposed changes in Medicaid rules and regulations could sidetrack his proposal to expand Medicaid coverage to approximately 225,000 so-called uninsured Kentuckians. *Motion, Aff.*, Exh. 3, *C-J*, November 8, 1991.

In his first State of the Commonwealth address delivered before the Kentucky General Assembly, Governor Jones stated, "I cannot and will not allow a temporary

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[1]Motion for Recusal of Special Justices, Affidavit of Stuart G. Yeoman, M.D. and articles from the Louisville *Courier-Journal*, all submitted to the Supreme Court of Kentucky on February 1, 1994, are hereinafter referred to as "Motion", "Aff." and "C-J", respectively.

budget problem to deter us from achieving our goals of affordable health care to every Kentuckian." *Motion, Aff.*, Exh. 5, *C-J*, January 14, 1992. On July 10, 1992, at the first meeting of the Governor's Commission for Health Care Reform, Governor Jones stated that "[h]ealth care reform is this administration's top priority." *Motion, Aff.*, Exh. 13, *C-J*, July 11, 1992. On July 13, 1992, he spoke even stronger words, stating that it "is very close to time to go to war to win health care reform in Kentucky" and that he "won't back away from his proposal to treat health care providers like utilities and regulate their rates." *Motion, Aff.*, Exh. 14, *C-J*, July 14, 1992.

In September, 1992, in the plan developed by his Commission for Health Care Reform, Governor Jones called for extending the tax on health care providers to more providers to help fund the expansion of the Medicaid program. *Motion, Aff.*, Exh. 18, *C-J*, September 3, 1992. The Governor's plan and the reforms would be financed without a new tax, but health care providers and individuals would be expected to pay so the coverage could be provided. *Id.* On September 9, 1992, Governor Jones formally unveiled his health reform plan. *Motion, Aff.*, Exh. 20, *C-J*, September 20, 1992. Under the Governor's plan, the Kentucky Medicaid program would be expanded to fully cover health care for unemployed adults living below the federal poverty level. *Id.* To pay for the plan, Governor Jones proposed broadening the existing tax on providers of health services to obtain additional federal Medicaid money. *Id.*

On September 18, 1992, Governor Jones promised to convene a special session of the Kentucky General Assembly in November, 1992, to consider his health care reform proposals, but less than a week later backed off on that promise. *Motion, Aff.*, Exhs. 21, 22, 23, *C-J*, September 19, 1992, September 24, 1992, September 25, 1992. On

November 8, 1992, Governor Jones stated, regarding his health care reform proposal, that "Kentucky was in a better position to act for the simple reason that this is my No. 1 priority, and I'm willing to spend all of my political capital if necessary to get this done." *Motion, Aff.*, Exh. 24, *C-J*, November 4, 1992.

In December, 1992, Governor Jones stated that in 1993 he planned to call a Special Session of the Kentucky General Assembly devoted specifically to health care reform. *Motion, Aff.*, Exh. 26, *C-J*, December 5, 1992. On December 8, 1992, Governor Jones stated that he "will do whatever it takes to get his health care reform plan passed. When we get this plan together. . .you will see a fight like you've never seen before. You just have to play hardball politics." *Motion, Aff.*, Exh. 27, *C-J*, December 9, 1992. Governor Jones further reiterated that his health care reform proposal was his "No. 1 priority." *Id.* On December 9, 1992, Governor Jones said his revised health care plan would be financed through cost saving measures and expanding the tax on health care providers. *Motion, Aff.*, Exh. 28, *C-J*, December 10, 1992.

On April 23, 1993, Governor Jones unveiled his health care reform bill [Kentucky House Bill 1] and said he would call a special session of the Kentucky General Assembly on May 10, 1993. *Motion, Aff.*, Exh. 33, *C-J*, April 24, 1993. The Louisville *Courier-Journal* reported that under Governor Jones' bill, doctors, hospitals and other health care providers would be taxed a percentage of their revenues and would be prohibited from passing the tax on to consumers in higher charges. *Id.* On May 7, 1993, Governor Jones said he would favor Legislators who supported his health care plan when he chooses park improvement projects. *Motion, Aff.*, Exh. 36, *C-J*, May 8, 1993. The Louisville *Courier-Journal* quoted Governor Jones as follows: "If you get to the point where you've got 3 or 4

worthy projects and they're all deserving, and one is sponsored by someone who's for your bill, and the other three are sponsored by someone who's against your bill, which one are you going to go for? I'm going to go for the one that was for the bill, of course." *Id.* On May 11, 1993, Governor Jones specifically mentioned health care providers being responsible for financing his reform plan. *Motion, Aff.*, Exh. 39, *C-J*, May 12, 1993. Governor Jones also disclosed his estimates of the cost of covering persons being added to the state's Medicaid rolls and stated that the additional cost would be paid by a tax on health care providers. *Id.* On May 27, 1993, Kentucky House Bill 1 was enacted and signed by Governor Jones.

According to the June 19, 1993 Louisville *Courier-Journal*, on June 18, 1993, when informed of a legal action planned by the Kentucky Medical Association challenging the two percent (2%) "provider tax" contained in Kentucky House Bill 1, Governor Jones said, through a spokesman, that he was disappointed by the KMA's decision and that when his goal of universal health insurance coverage is achieved, doctors will be paid for serving indigent people in excess of the two percent (2%) "provider tax". *Motion, Aff.*, Exh. 49, *C-J*, June 19, 1993.

While this litigation was on appeal after the Franklin Circuit Court's November 23, 1993 ruling that the "provider tax" was unconstitutional and void under Section 59 of the Kentucky Constitution, Governor Jones continued to stress the importance of the "provider tax" to his "No. 1 priority". On December 9, 1993, Governor Jones announced that Health and Human Services Secretary Donna Shalala had approved Kentucky's five-year pilot project, which would begin July 1, 1994 and which would dramatically expand coverage under Kentucky's Medicaid Program. *Motion, Aff.*, Exh. 57, *C-J*, December 10, 1993. Governor Jones acknowledged that the Medicaid expansion depended

upon the outcome of the Commonwealth's appeal to the Supreme Court of Kentucky over the two percent (2%) "provider tax", but stated that he believed the Supreme Court of Kentucky would issue a ruling quickly. *Id.* Even after the recusal of Kentucky Supreme Court Justices Lambert, Spain and Leibson, and the Governor's appointment of three (3) Special Justices to hear and decide the merits of the Commonwealth's appeal, Governor Jones continued to stress the importance of the "provider tax" to his political and social agenda in his 1994 State of the Commonwealth Address, where he stated:

> A centerpiece to the health care financing issue and to the state budget is, of course, the retention of the provider tax. We must collect this amount of money, have it more than tripled in Washington, and give it to providers to pay for the health care of thousands of Kentuckians.

In sum, Governor Jones initiated, drafted, and actively lobbied for the passage of Kentucky House Bill 1, and made the "provider tax" provisions thereof the cornerstone of his legislative agenda and his "number one priority". Clearly, Governor Jones was a party-in-interest in the appeal before the Supreme Court of Kentucky and the Petitioners' success before the Supreme Court of Kentucky would have jeopardized his stated goals.

III. Proceedings Below

On July 23, 1993, Petitioners, STUART G. YEOMAN, M.D., TIM HULSEY, M.D., JOE DAVIS, M.D., and JOSEPH JANES filed suit in Franklin Circuit Court challenging the constitutionality of Kentucky House Bill 1, including that part of the statute imposing a "provider tax", on federal and state constitutional grounds. On July 2, 1993, CHARLES C. SMITH, JR., M.D., FRED L. BARNETT, M.D., WILLIAM B. MONNIG, M.D., and the KENTUCKY MEDICAL ASSOCIATION had filed suit in

Franklin Circuit Court challenging the constitutionality of Kentucky House Bill 1, including that part of the statute imposing a "provider tax", on state and federal constitutional grounds. On September 2, 1993, the Franklin Circuit Court consolidated the two cases. Before the Franklin Circuit Court, both the Petitioners and the Respondents filed Motions for Summary Judgment. On November 23, 1993, the Franklin Circuit Court entered its Order granting the Petitioners' Motion for Summary Judgment. The Franklin Circuit Court held, *inter alia*, that Section 3 of Kentucky House Bill 1 constituted special legislation, in violation of Section 59 of the Kentucky Constitution. See, *November 23, 1993 Order of the Franklin Circuit Court*, Appendix, pp. 1a-14a. The Franklin Circuit Court concluded as follows:

> House Bill 1, Section 3, is not limited to the 60 percent of physicians participating in the Medicaid program but applies to the gross revenues of all physicians practicing in Kentucky. This section constitutes special legislation, prohibited by Section 59 of the Kentucky Constitution. The classifications established in the Act are not based upon reasonable and natural distinctions and are not logically related to the purposes of the legislation. There is no reasonable basis to single out these health care providers to pay special taxes to support the Medicaid program. This program benefits the state's residents as a whole and there are no justifiable reasons for arbitrarily designating physicians to pay for it. Section 59 was designed to restrict the legislature from favoring or disfavoring particular groups, however advantageous it may be to do so. . . .
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> * * *
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> In light of this Court's determination that the tax on physicians violates Section 59 of the Kentucky Constitution, it is not necessary to address the issues of due process and equal protection.

November 23, 1993 Order of the Franklin Circuit Court, Appendix pp. 12a-13a.[2]

After the Respondents timely filed their Notice of Appeal on December 16, 1993, the Supreme Court of Kentucky granted transfer of the appeal from the Court of Appeals of Kentucky. See, *December 16, 1993 Order Granting Transfer,* Appendix, pp. 15a-16a. On December 15, 1993, three (3) Justices of the Supreme Court of Kentucky recused themselves from consideration of the Respondents' appeal, claiming conflicts of interest. See, *Notices of Recusal of Justices Joseph E. Lambert and Thomas B. Spain,* Appendix, pp. 17a-19a; *Order of Recusal of Justice Charles M. Leibson,* Appendix, pp. 20a-21a. On January 6, 1994, Kentucky Governor Brereton C. Jones appointed three (3) Special Justices, all private, practicing attorneys, to the Supreme Court of Kentucky to hear and decide the merits of the Respondents' appeal. See, *January 6, 1994 Executive Order of Governor Brereton C. Jones,* Appendix, p. 22a. After the Petitioners sought the recusal of the three (3) Special Justices, one of the three (3) Special Justices, Sheryl G. Snyder, declined the appointment as Special Justice to the Supreme Court of Kentucky. See, *February 9, 1994 Letter of Sheryl G. Snyder to Governor Brereton C. Jones,* Appendix, pp. 23a-24a. On February 15, 1994, Kentucky Governor Brereton C. Jones appointed R. Kent Westberry,

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[2]Ky. Const. §59 has long been interpreted by the Kentucky appellate courts as providing greater protection for individual liberty and against arbitrary exercises of legislative power than the United States Constitution and other state constitutions, and the Kentucky appellate courts, like the Franklin Circuit Court in the present case, have repeatedly and consistently invoked this state constitutional provision to void arbitrary legislative classifications. See, *Tabler* v. *Wallace,* 704 S.W.2d 179 (Ky. 1985); *Perkins* v. *Northeastern Log Homes,* 808 S.W.2d 809 (Ky. 1991); *Com.* v. *Wasson,* 842 S.W.2d 487 (Ky. 1992).

a private, practicing attorney, to replace Special Justice Sheryl G. Snyder. See, *February 15, 1994 Executive Order of Governor Brereton C. Jones,* Appendix, p. 25a. On February 16, 1994, the Petitioners filed their Motion in the Supreme Court of Kentucky seeking the recusal of Special Justice R. Kent Westberry and renewing the Motion for the Recusal of Special Justices Stephen C. Cawood and Ben S. Fletcher, III.

On February 16, 1994, Special Justices Fletcher, Cawood, and Westberry declined to recuse themselves from considering the merits of the Respondents' appeal. See, *February 16, 1994 Orders of Special Justices Ben S. Fletcher, III, Stephen C. Cawood, and R. Kent Westberry Declining Recusal,* Appendix, pp. 26a-28a. Also on February 16, 1994, the Supreme Court of Kentucky refused to order the recusal of Special Justices Ben S. Fletcher, III, Stephen C. Cawood, and R. Kent Westberry. See, *February 16, 1993 Order of the Supreme Court Refusing to Order Recusal,* Appendix, pp. 29a-30a.

On March 24, 1994, the Supreme Court of Kentucky rendered its Opinion reversing the November 23, 1993 Order of the Franklin Circuit Court. Five (5) Justices, including all three (3) Special Justices appointed by Governor Brereton C. Jones, held, *inter alia,* that Kentucky House Bill 1 did not constitute "special legislation" violative of Section 59 of the Kentucky Constitution and did not violate Petitioners' rights to due process and equal protection under the Kentucky Constitution and the Constitution of the United States. *March 24, 1994 Opinion of the Supreme Court of Kentucky,* Appendix, pp. 31a-49a. The Majority Opinion further addressed the Petitioners' Motions to Recuse the three (3) Special Justices appointed by Kentucky Governor Brereton C. Jones, concluding that:

> "[N]o argument has been sufficiently advanced as to raise an infirmity under the federal and state constitution which results from the governor's fulfilling

his duties of judicial appointment under Section 110(3) [of the Kentucky Constitution].

March 24, 1994 Opinion of the Supreme Court of Kentucky, pp. 13-14, Appendix, p. 41a.

REASONS FOR GRANTING THE WRIT

I. The Appointment by Kentucky Governor Brereton C. Jones of the Three Special Justices to the Supreme Court of Kentucky to Decide the Merits of the Respondent's Appeal and the Refusal of the Supreme Court of Kentucky to Order Recusal of the Special Justices Denied the Petitioners Due Process of Law Guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

It is but an elemental concept of constitutional jurisprudence that in every judicial proceeding, every citizen, as a matter of constitutional right, is entitled to an impartial tribunal. In his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 173-174, 71 S.Ct. 624, 650 (1951), Mr. Justice Frankfurter recognized the vast significance of the due process clauses of the Fifth and Fourteenth Amendments to the continued vitality of our system of government, and citizens' continued confidence in our system of government, observing:

> Due process is not confined in its scope to the particular forms in which rights heretofore have been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances.

The Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States mandate an impartial tribunal, lest the guarantees that a citizen's liberty and property may be protected become ut-

ter nullities. Thus, when speaking of an administrative hearing to determine the termination of public assistance benefits, Mr. Justice Brennan, speaking for this Honorable Court, stated that "[o]f course, an impartial decisionmaker is essential". *Goldberg* v. *Kelley*, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970); *see also, In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed 942 (1955); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616 (1950).

More importantly, this Honorable Court and numerous lower federal courts, as did the Framers of the Constitution and the Bill of Rights, have repeatedly emphasized that **actual** conflict of interest, bias, or prejudgment in adjudicating matters are not the sole litmus tests for determining whether the due process protections of the Constitution of the United States have been honored and satisfied in a particular case. "The heart of the matter", wrote Mr. Justice Frankfurter, "is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness. . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 170, 71 S.Ct. 624, 647 (1951). Yet fairness includes not only the guarantee of independence of the judiciary from executive or legislative dominance, but also assuring the citizenry that there exists no appearance of such dominance. Fundamentally, fairness includes the appearance of fairness, and historically, the appearance of fairness lies at the heart of the Constitution's procedural dictates.

"The Framers of the Bill of Rights were not interested in procedure", wrote constitutional law scholar John Leubsdorf, "they were obsessed by it. Provisions governing Court procedures dominate the Bill of Rights much more than a student of political philosophy would expect." Leubsdorf, J., *Constitutional Civil Procedure*, 63 Tex. L.Rev.

578, 587 (1984). Such was also true of the Framers of the Fourteenth Amendment. See generally, *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 437 (1961). In the minds of the Framers, procedural fairness included not only the guarantee of independence of the judiciary from executive or legislative dominance (particularly where the executive has an interest in the outcome of a given case), but also assuring the citizenry that there exists no appearance of such dominance. Daniel Webster perhaps stated the proposition best when he once remarked: "In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done." McIntyre, J.W., ed., *The Writings and Speeches of Daniel Webster*, 5: 163.[3] Translating the words of Daniel Webster into the judicial setting, the Lord Chief Justice of England once concluded that whether actual bias may exist in a given case is not the dispositive issue. "Time and again", he wrote, "this court has said that justice must not only be done but must manifestly be seen to be done." *Rex* v. *Bodmin*, 1 K.B. 321, 325 (1847).

The concepts enunciated by Daniel Webster and the Lord Chief Justice in their times were well known to the Founding Fathers of the Republic in the years preceding them. The Second Continental Congress drafted into the Declaration of Independence a long series of abuses of King George III which they deemed most objectionable. One of those abuses was that "[h]e [the King] has made judges dependent on his will alone. . . ." More importantly, in the Federal Convention of 1787, the drafters of the Constitution of the United States, in considering the appointment of Justices of the Supreme Court of the United States,

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[3]Speech made in the House of Representatives of the United States, January 4, 1826, on the Bill to amend the Federal Judiciary System.

were highly concerned about the federal judiciary being influenced by either of the other coordinate branches of government. These concerns prompted Alexander Hamilton to address the issue. Alexander Hamilton, quoting Montesquieu, wrote:

> I agree that "**there is no liberty if the power of judging be not separated from the legislative and executive powers.**" And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, **but would have everything to fear from its union with either of the other departments;** that as all the effects of such a union must ensure from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary, **it is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches;** and that as nothing can contribute so much to its firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure as the citadel of the public justice and the public security.
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> **The complete independence of the courts of justice is peculiarly essential in a limited constitution.** (Emphasis added.)

Cooke, J.E., ed., *The Federalist*, No. 78 (Middletown, 1961), 523-524.

The decisional law of this Honorable Court has clearly and articulately expressed the concerns of the Founding Fathers of the Republic for not only independence and, hence, fairness and impartiality in judicial proceedings, but the guarantee of the appearance of such fairness and impartiality. In *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), where a Michigan state court judge who sat as a judge-grand juror also presided at the

contempt hearing involving one of the witnesses who had testified before him, this Honorable Court concluded that such judicial conduct violated the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. Taking care to note the law as it applies in cases such as the case *sub judice*, Mr. Justice Black observed:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course required an absence of actual bias in the trial of cases. **But our system of law has always endeavored to prevent even the probability of unfairness.** To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. **Circumstances and relationships must be considered.** This Court has said, however, the "Every procedure which would offer a temptation to the average man as a judge. . .not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law." *Tumey* v. *State of Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13.

In re Murchison, 349 U.S., at 136, 75 S.Ct., at 625 (Emphasis added); *see also, Taylor* v. *Hayes*, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974).

Similarly, this Honorable Court has often couched the problem of fairness in terms of the tribunal's "neutrality". In *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1989), Mr. Justice Marshall discussed the

mandate for neutrality, real or perceived, in the adjudication process as required by the Due Process Clauses of the Fifth and Fourteenth Amendments. Mr. Justice Marshall wrote:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivation and the promotion of participation and dialog by affected individuals in the decisionmaking process. See *Carey* v. *Piphus*, 435 U.S. 247, 259-262, 266-267, 98 S.Ct. 1042, 1043, 1050-1052, 1053, 1054, 55 L.Ed.2d 252 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted corruption of the facts or law. See *Matthews* v. *Eldridge*, 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976). At the same time, it **preserves both the appearance and reality of fairness, "generating the feeling, so important to a poplar government, that justice has been done,"** *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), **by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.**

Marshall v. *Jerrico, Inc.*, 446 U.S., at 242, 100 S.Ct., at 1613 (Emphasis added).

In *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986), this Honorable Court again reiterated and applied its longstanding precedents under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution to hold that an insurer's rights under the Due Process Clause of the Fourteenth Amendment were violated by an Alabama Supreme Court Justice's participation in an action seeking

punitive damages for the insurer's alleged bad-faith refusal to pay a valid claim. In *Lavoie,* the Alabama Supreme Court Justice, at the time he cast the deciding vote and authored the Alabama Supreme Court's Opinion, had pending at least one very similar bad faith refusal-to-pay lawsuit against an insurer in another state court. Writing for this Honorable Court without dissent, Mr. Chief Justice Berger concluded:

> We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey, Murchison,* and *Ward.* We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "would offer a possible temptation to the average. . .judge to. . .lead him to not to hold the balance nice, clear and true." *Ward,* 409 U.S., at 60, 93 S.Ct., at 83 (quoting *Tumey* v. *Ohio, supra,* 273 U.S., at 532, 47 S.Ct., at 444). The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice'." *Murchison,* 349 U.S., at 136, 75 S.Ct., at 625 (citation omitted).

Aetna Life Ins. Co. v. *Lavoie,* 475 U.S., at 825, 106 S.Ct., at 1587.

This Honorable Court then went on to hold that, in order that the "appearance of justice" be served, the decision of the Supreme Court of Alabama would be vacated and the case remanded for further proceedings. *Id.*, 475 U.S., at 828, 106 S.Ct., at 1589.

Before the Supreme Court of Kentucky, it was manifest that Kentucky Governor Brereton C. Jones was a party-in-interest in the case. Governor Jones drafted the Kentucky legislation which was being challenged, called the Kentucky General Assembly into an extraordinary session to consider and pass the legislation, and publicly lob-

bied for the enactment of the legislation. Governor Jones openly asserted that the legislation, and particularly the "provider tax" provisions of the legislation, was one of the cornerstones of his administration. Governor Jones publicly stated that he would play "hardball politics" and would do "whatever it takes" to get his health care reform plan enacted, a plan inextricably linked to the validity of the "provider tax" challenged by the Petitioners. Governor Jones went so far as to publicly comment about one of the Appellees before the Supreme Court of Kentucky, the Kentucky Medical Association, and even reiterated publicly after his appointment of the three (3) Special Justices to the Supreme Court of Kentucky that the challenged statute and "provider tax" contained therein was the highest priority of his administration.

Manifestly, the appointment by Governor Jones of three (3) Special Justices to the Supreme Court of Kentucky to decide the fate of his administration's "highest priority" totally undermined the appearance of independence, impartiality, and fairness of the Supreme Court of Kentucky, and flew directly in the face of this Honorable Court's longstanding and often-repeated admonition that "[j]ustice must satisfy the appearance of justice". *Offutt* v. *United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954).[4]

For one to expect the Petitioners, much less the citizenry of the Commonwealth of Kentucky, to believe that the Governor did not select three (3) Special Justices who

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[4]To satisfy the appearance of justice, the Chief Justice of the Supreme Court of Kentucky, rather than Governor Jones, could have readily appointed Special Justices to hear and decide the merits of the Respondents' appeal. See, Ky. Const. §110(3) (authorizing Governor to appoint Special Justices when "as many as two" regular Justices decline to sit); KRS 26A.015(3)(a) (authorizing Chief Justice to replace "any justice. . .disqualified" under statute); *Kentucky Utilities Co.* v. *South East Coal Co.*, 836 S.W.2d 407 (Ky. 1992), *cert dismissed*, __ U.S. __, 113 S.Ct. 1147, 122 L.Ed.2d 498 (1993) (applying KRS 26A.105(3)(a)).

agreed with him in the outcome of the appeal is wholly illogical and unrealistic. The Honorable Arthur S. Alarcon, Judge of the United States Court of Appeals for the Ninth Circuit and a former California appellate judge, matter-of-factly stated the problem of gubernatorial appointments to state courts in a public address delivered not long ago where he asserted: "The appointment of judges by an elected politician can lend itself only to the logical inference that, regardless of the academic merits or professional credentials of the candidate, the person chosen reflects the social, political and economic views of the governor." (Speech, March 2, 1982) Alarcon, Hon. A., *Political Appointments and Judicial Independence — An Unreasonable Expectation*, 16 Loyola of Los Angeles L.Rev. 9, 12 (1982). (Emphasis added.) The fact that Governor Jones named three (3) Special Justices who were private, practicing attorneys was problematic. No one could reasonably dispute the fact that all private, practicing attorneys represent individuals and organizations having business with or subject to the jurisdiction of executive agencies of state government. The appearance of unfairness and partiality, and the appearance of the absence of independence, utterly tainted the judicial process before the Supreme Court of Kentucky. The concerns of the Framers, repeatedly echoed by this Honorable Court in its due process jurisprudence, were openly ignored before the Supreme Court of Kentucky and the appearance of justice was irreparably undermined, actions which serve only to engender the certain erosion of the citizenry's confidence in the decisional processes within the courts of the Commonwealth of Kentucky.[5] The controlling precedents of this Honorable Court

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[5]Before the Supreme Court of Kentucky, the Petitioners also argued that Kentucky Supreme Court Rule 4.300, *Code of Judicial Conduct*, Canon 2, which provides that "[a] judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (emphasis added),

(Continued on next page)

interpreting and applying the protections of the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States clearly condemn such results and mandate vacatur of the decision of the Supreme Court of Kentucky.

II. The "Provider Tax" Provisions of Kentucky House Bill 1 Are Violative of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

It has long been established that the pursuit of a lawful occupation is a property right within the meaning of the Fourteenth Amendment to the Constitution of the United States. *Louis K. Liggett Co.* v. *Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928). The practice of a learned profession such as medicine has expressly been recognized as a "property" right within the meaning of the Due Process Clause of the Fourteenth Amendment, *Dent* v. *West Virginia*, 129 U.S. 114, 122, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889), and such property is not held "at the mercy of the legislature". *Munn* v. *Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1876).

The Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States pro-

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(Continued from preceding page)

also required recusal of the three (3) Special Justices appointed by Governor Jones. This Honorable Court recently observed that the public's willingness "to indulge suspicion and doubts concerning the integrity of judges" is a concern which "has constitutional dimensions". *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 864-865, 108 S.Ct. 2194, 2205, 100 L.Ed.2d 885, n. 12 (1988).

vide substantive limits on the powers of the state over the property of its citizenry. As this Honorable Court has stated:

> Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case. . .and thus exclude[s], **as not due process of law,** acts of attainder, bills of pains and penalties, acts of confiscation . . . and other similar special, partial and arbitrary exertions of power under the forms of legislation. **Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of personal monarch or of an impersonal multitude.**

Hurtado v. *California,* 110 U.S. 516, 535-536, 4 S.Ct. 111, 121, 28 L.Ed. 232 (1884). (Emphasis added.)

Similarly, in *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415, 40 S.Ct. 560, 561-562, 64 L.Ed. 989 (1900), this Honorable Court articulated the test for determining whether a state classification comports with Equal Protection principles by holding that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Put differently, "a classification must rest upon some ground of difference having a fair and substantial relation to the object of the Legislation" and the state "may not resort to a classification that is palpably arbitrary." *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522, 527, 79 S.Ct. 437, 441 (1959); *see also, Brown-Forman Co.* v. *Commonwealth of Kentucky,* 217 U.S. 563, 573, 30 S.Ct. 578, 580, 54 L.Ed. 883 (1910); *State Board of Tax Com'rs of Indiana* v. *Jackson,* 283 U.S. 527, 537, 51 S.Ct. 540, 543, 75 L.Ed. 1248 (1931).

In the present case, the Governor and the General Assembly of the Commonwealth of Kentucky consciously chose

arbitrarily to single out a specific class, a select group of health care providers, to bear a tax burden which must properly be borne by all citizens of the Commonwealth. Medicaid is a welfare program which assists indigent citizens in particular, and all Kentuckians in general. Yet the "provider tax" contained in Kentucky House Bill 1 blatantly targets certain classes of health care providers for convenience and political expedience in order for the Governor and the members of the Kentucky General Assembly to avoid accountability at the polls. By singling out a discrete class of health care providers for a "forced contribution to general government revenues," *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163, 101 S.Ct. 446, 452, 66 L.Ed.2d 358 (1980), the Governor and the Kentucky General Assembly have guaranteed no real accountability in the exercise of the taxing power. Furthermore, by prohibiting the "provider tax" from being passed on to the general public and third-party payers except in the case of pharmacies, the Governor and the Kentucky General Assembly have virtually guaranteed that the political fall-out will be limited. Finally, both physicians and pharmacies dispense outpatient medications under substantially similar conditions. Yet, Kentucky House Bill 1 arbitrarily forbids physicians from passing on the prescription tax to third-party payers while arbitrarily granting pharmacies the privilege of doing so. Mr. Chief Justice John Marshall noted that "[t]he power to tax involves the power to destroy", *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 159, 4 L.Ed. 579 (1819). The Opinion of the Supreme Court of Kentucky renders the due process and equal protection guarantees of the Constitution of the United States illusory rights for physicians, granting the Governor and the Kentucky General Assembly the power to destroy by selectively and arbitrarily targeting physicians to bear society's fiscal burdens for social programs. Such overtly

hostile legislative classifications should not be permitted to stand under the Due Process and Equal Protection Clauses of the Constitution of the United States.

CONCLUSION

For the reasons set forth hereinabove, a Writ of Certiorari should issue to review the Opinion of the Supreme Court of the Commonwealth of Kentucky.

Respectfully submitted,

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APPENDIX

FRANKLIN CIRCUIT COURT
DIVISION I

Civil Action Nos. 93-CI-00959
93-CI-01275

CHARLES C. SMITH, Et Al., - - - - - - *Plaintiffs*

v.

COMMONWEALTH OF KENTUCKY, REVENUE CABINET, Et Al., - - - - - - - - - - - *Defendants*

AND

HEALTH MAINTENANCE ORGANIZATION ASSOCIATION OF KENTUCKY, INC., Et Al., - - - - - *Plaintiffs*

v.

COMMONWEALTH OF KENTUCKY, REVENUE CABINET, Et Al., - - - - - - - - - - - *Defendants*

ORDER—Entered November 23, 1993

I. STATEMENT OF THE CASE

This action is a consolidation of three separately filed cases. *Charles C. Smith, Jr., M.D., et al.*, v. *Commonwealth of Kentucky Department of Revenue, et al.*, 93-CI-0959, was filed July 2, 1993. *Stewart G. Yeoman, M.D., et al.* v. *Commonwealth of Kentucky Department of Revenue et al.*, 93-CI-01097, was filed July 23, 1993. *Yeoman* was consolidated into *Smith* by Order of the Franklin Circuit Court dated September 2, 1993. *Health Maintenance Organization Association of Kentucky, et al.* v. *Commonwealth of Kentucky Department of Revenue et al.* was filed August 19, 1993. On September 2, 1993, this case was consolidated with *Smith* for purposes of briefing schedules and oral argument.

The Plaintiffs in these consolidated cases are Dr. Fred L. Barnett, Dr. Joe Davis, Dr. Tim Hulsey, Dr. William B. Monning, Dr. Charles C. Smith, Jr., Dr. Stewart G. Yeoman, the Kentucky Medical Association, the Health Maintenance Organization Association of Kentucky, and nine health maintenance organizations ("HMO's") operating in Kentucky.

Each physician Plaintiff is licensed to practice medicine in the Commonwealth of Kentucky and each of them except Dr. Barnett participates in the state Medicaid program. Dr. Barnett does not participate in Medicaid but accepts indigent patients as a regular part of his practice.

The Kentucky Medical Association is a nonprofit Kentucky corporation representing approximately 4,000 physicians. The Health Maintenance Organization Association of Kentucky is a nonprofit corporation organized to promote the business interests of its members, health maintenance corporations authorized pursuant to Chapter 304, Subtitle 38 of the Kentucky Revised Statutes.

The Defendants are the Kentucky Revenue Cabinet ("the Revenue Cabinet") and its Secretary Kim Burse, the Kentucky Cabinet for Human Resources ("CHR") and its Secretary Fontaine Banks, and the Kentucky Health Care Data Commission ("the Commission"). The Commission is an administrative agency established by House Bill 1, Section 22, passed by the Second Extraordinary Session of the General Assembly, 1993. The Commission is authorized to investigate, audit, and analyze data concerning Kentucky's health care providers.

At issue in this consolidated action are taxes on health care providers imposed by House Bill 1 which was enacted in response to the Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991. (Pub. L. 102-234). These amendments restricted federal financial participation ("FFP") in Medicaid programs in states whose programs were partially funded by "impermissible health care related taxes." The 1991 Amendments invalidated

the provider tax then in effect in Kentucky. The Kentucky tax was an impermissible health care related tax because it: (1) was only assessed against providers who participated in the Medicaid program; (2) included a hold harmless provision; and (3) taxed different providers at different rates depending on their Medicaid receipts. Each of these provisions violated the federal amendments of 1991.

House Bill 1 established provider taxes that would comply with the strictures set out in the 1991 Federal Amendments and maximize the state's eligibility for federal matching funds. The bill taxed several categories of health care providers. Section 2 established a 2.5 percent tax on hospitals' gross revenues. Section 3(1) imposed a 2 percent tax on the gross revenues of physicians, a tax applicable to all physicians regardless of whether they participated in the Medicaid program. Section 4(1) established a 25 cent tax on each prescription and Section 4(1)(a) permitted this tax to be passed along to insurers, HMO's, and other health service corporations. Section 5(1), on the other hand, prohibited hospitals and physicians from passing on the tax imposed on them. Section 20 provided for funding the disproportionate share program.

A Senate Amendment to House Bill 1 established the Health Care Data Commission. Sections 22 to 30. Section 29 of the Senate's amendment made cooperation with the Commission a condition of licensure in the state.

The Governor vetoed a portion of House Bill 1 and there was no legislative review of the bill after that veto.

1. GROUNDS FOR RELIEF, *SMITH*

The Plaintiffs in *Smith* request Summary Judgment declaring House Bill 1 and all of its provisions void, unconstitutional and unenforceable. They further request a Permanent Injunction against Secretaries Burse and Banks from enforcing and implementing the provisions of the bill.

The Plaintiffs request this relief on constitutional grounds. They claim that House Bill 1 violates their right to due process guaranteed by the United States and Ken-

tucky Constitutions. In support of this claim, Plaintiffs argue that there is no rational basis to tax physicians more than the general public to fund a program such as Medicaid which benefits society as a whole. They also claim that the bill's prohibition against passing through the tax violates their due process rights to charge their patients in a manner and amount they deem appropriate.

The Plaintiffs challenge the bill on equal protection grounds. They claim House Bill 1 sets up unreasonable, arbitrary, and unfair classifications that are not substantially related to the purposes of the legislation. Plaintiffs also claim that all people similarly situated are not treated alike. They maintain that the legislation is too broad because it covers all physicians regardless of participation in the Medicaid program and they claim that it is too narrow because it does not cover all health care professionals who do participate in Medicaid.

The Plaintiffs contend that House Bill 1 violates Section 59 of the Kentucky Constitution which prohibits indiscriminate legislative classifications. They suggest that placing an unequal burden on them is a politically motivated and punitive action, something Section 59 is designed to protect Kentucky citizens against.

The Plaintiffs suggest that the Governor's partial veto after the legislature adjourned invalidates the bill in its entirety. According to the Plaintiffs, such a veto violates Section 88 of the Kentucky Constitution.

The Plaintiffs suggest that House Bill 1 violates Section 51 of the Kentucky Constitution which requires the title of an act to give fair and reasonable notice of its contents and requires that a bill relate to no more than one subject. The Plaintiffs claim that the bill's title, "An Act relating to health care and safety, providing for revenues to finance health care, making appropriations, and declaring an emergency," violated Section 51, because the title failed to mention the provider tax. The bill also violated Section 51, according to the Plaintiffs, because it

dealt with more than one subject, financing and the establishment of the Commission.

The Plaintiffs also claim that the Senate amendment violated Section 47 of the Kentucky Constitution, which requires revenue bills to originate in the House. Section 47 permits the Senate to amend revenue bills but nothing unrelated to raising revenue may be introduced. The provision for the Health Care Data Commission, according to the Plaintiffs, constituted a new matter, unrelated to raising revenue.

The Plaintiffs also object to House Bill 1 because it creates, in the Commission a powerful, independent state agency, not answerable to any of the three branches of government. Therefore, the Plaintiffs claim, the establishment of that agency is a violation of separation of powers.

The Plaintiffs object to Section 17 of House Bill 1 because it provides that the Revenue Cabinet may require providers to post a bond in an amount to be determined by the Cabinet. The Plaintiffs claim that this is an unconstitutional delegation of power to the Cabinet which violates Sections 29 and 60 of the Kentucky Constitutions.

The Plaintiffs maintain that Sections 6, 8, and 16 of House Bill No. 1 amount to an unconstitutional delegation of the state's power to tax in violation of Sections 27, 28, 29, 42, 47, and 60 of the Kentucky Constitution. These sections of the bill give the Revenue Cabinet discretion to raise and lower provider taxes and to expand the list of services subject to the tax, as federal law permits. Section 16 requires providers to remit taxes directly to the Revenue Cabinet on a monthly basis, and requires the Revenue Cabinet to notify providers of any rate change.

The Plaintiffs object to Section 26 of House Bill 1, allowing the Commission to enter providers' premises and conduct independent audits. According to the Plaintiffs, this Section permits unbridled agency discretion in investigating physicians' medical offices. Such unlimited discretion violates the Fourth Amendment to the United States

Constitution and Section 10 of the Kentucky Constitution, according to the Plaintiffs.

The Plaintiffs also object to Sections 23 through 29 because they require providers to furnish patient records and information to the Commission in violation of the right to privacy guaranteed by the United States and Kentucky Constitutions.

2. GROUNDS FOR RELIEF, *HEALTH MAINTENANCE ORGANIZATION ASSOCIATION OF KENTUCKY, ET AL.*

The Health Care Maintenance Organization Association of Kentucky, Inc., et al. requests temporary and injunctive relief from implementing or enforcing House Bill No. 1 against the Plaintiff HMO's, a declaration of rights that House Bill 1 is null, void and unenforceable in violation of the United States and Kentucky Constitutions, restitution of taxes paid pursuant to House Bill 1, and attorney fees and costs.

The Plaintiff HMO's assert the same constitutional grounds in opposition to House Bill 1 as do the *Smith* Plaintiffs but make additional arguments.

The HMO's claim that House Bill 1 does not tax HMO premiums paid by members to insure coverage. They maintain that the language of the bill itself and the intent of the Legislature prove this claim. The word "premiums" is not used in the bill and the bill is limited to taxes on gross revenues received "for the provision of health care items or services." HMO's are not "providers" in the sense intended by House Bill 1 but are third party payers, according to the Plaintiffs.

The Plaintiffs claim that HMO premiums may not be taxed under federal law. House Bill 1 provides for "permissible health-care related taxes" and federal regulations only permit taxes on HMO services, not premiums.

The Plaintiffs claim that HMO's are not eligible to participate in Medicaid in Kentucky and are therefore ex-

cluded from taxation under House Bill 1. Kentucky law requires CHR to determine what groups may participate in Medicaid and CHR regulations require that an HMO have a contract with CHR in order to provide Medicaid services. There is no contract between any HMO and CHR to provide such services. While it is potentially possible for HMO's to participate in the state's Medicaid program, that is not the case now and, therefore, HMO's may not be taxed under House Bill 1.

The Plaintiffs also maintain that federal law preempts House Bill 1 because it relates to group health plans and seeks to impose a tax on a payment made for federal employee health plans. According to the Plaintiffs, the Employee Retirement Income Security Act ("ERISA") preempts all state laws relating to any employee benefit plan. House Bill 1 will change the price, quality, and character of ERISA plans HMO's offer. Because of this, House Bill 1 is preempted by ERISA. The Federal Employee Health Benefit Act ("FEHBA") also preempts House Bill 1 because, according to the Plaintiffs, the bill seeks to impose a tax on a federal employee health plan.

3. DEFENDANT'S RESPONSE TO PLAINTIFF'S CLAIMS

The Defendants request that the Court grant their Motion for Summary Judgment and hold House Bill No. 1 constitutional.

The Defendants assert several grounds in support of their Motion. They claim that House Bill No. 1 does not violate due process or equal protection under the United States or Kentucky constitutions. They maintain that the state has broad authority to establish classifications for the purpose of taxation. The Defendants deny that House Bill No. 1 is special legislation, prohibited by Section 59 because legislative classifications with rational basis do not constitute special legislation. Defendants also claim that voluntary compliance with a federal statutory scheme has been found to be general legislation. *Wagoner* v. *Wagoner,* Ky., 846 S.W.2d 704 (1993). They maintain that the

Governor properly exercised the line item veto because House Bill No. 1 is an appropriations bill and the Governor is authorized to make line item vetoes in such bills. Even in cases where a veto is improperly exercised, the bill in question becomes law with the vetoed portion intact, according to the Defendants.

The Defendants also maintain that Section 51 of the Kentucky Constitution, pertaining to the title and contents of bills, has not been violated. The Defendants point out that this Section has always been liberally construed with doubts as to compliance resolved in favor of the legislative act. They also maintain the Section 47 has not been violated because the Senate amendment creating the Health Care Data Commission was intricately related to the remainder of the bill. Data collection such as that provided for by the amendment is vital to the proper administration of indigent care.

The Defendants also maintain that principles of separation of powers have not been violated by House Bill 1. The disputed bond requirement is an administrative compliance tool. The creation of Health Care Data Commission itself is not a violation of separation of powers because, while it is an independent agency, it is clearly an executive branch agency.

The Defendants argue that the collection of data by the Commission will not violate the privacy rights of physicians or patients. Data collected will involve cost, quality, and outcome and the confidentiality of medical records will not be compromised.

In regard to the specific assertions of the HMO Plaintiffs, Defendants claim that the plain language of the bill permits taxation of HMO premiums and HMO's are not prohibited by state law from participating in Medicaid. They also maintain that ERISA and FEHBA do not preempt House Bill No. 1.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

There being no issue of material fact in dispute, all parties have moved for Summary Judgment pursuant to Civil Rule 56 and *Steelvest* v. *Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476 (1991).

The Governor's veto of a portion of House Bill 1, Section 20, was a proper exercise of the line item veto provided for in Section 88 of the Kentucky Constitution. That Section provides that "[t]he Governor shall have the power to disapprove any part or parts of appropriation bills embracing distinct items. . . ." Ky. Const. Section 88. House Bill 1 is an appropriation act as defined in KRS 48.010(4): "any act of the general assembly that authorizes the expenditure of public funds. . . ." House Bill 1 clearly authorizes the expenditure of public funds. House Bill 1, Section 20, for example, establishes and allocates revenue to the MART and MAIT funds. The Governor's veto was in compliance with Section 88 and, therefore, does not invalidate House Bill 1.

House Bill 1 does not violate the provision of Section 51 of the Kentucky Constitution which requires that the subject matter of a bill be reflected in its title. Therefore, House Bill 1 cannot be invalidated on that ground.

House Bill 1 was amended by the Senate to establish the Health Care Data Commission ("the Commission"). (House Bill 1, Sections 22-29.) The Plaintiffs claim that this amendment is invalid under Kentucky Constitution because it violates: (1) the separation of powers provisions of Sections 27 and 29 by creating an independent agency; (2) Section 47 because the amendment is unrelated to raising revenue; and (3) Section 51 because the amendment causes the bill to relate to more that one subject and the title does not reflect the Commission's establishment.

The Court is not convinced by Plaintiff's argument that the Commission is an independent agency. The Sections of House Bill 1 establishing the Commission refer to it as "an independent agency of state government" (House Bill

1, Section 23(1)) but the Commission is, in fact, an executive branch agency. It is required by statute to coordinate its activities with other executive agencies, (House Bill 1, Section 24(3)), it is administratively attached to the Cabinet for Human Resources, (House Bill 1 Section 23(1)), and its members are appointed by the Governor and may be removed by him for cause, (House Bill 1, Section 23(2)). For these reasons, the Court finds that the Health Care Data Commission is an executive agency and not an independent agency. Therefore, Sections 27 and 28 of the Kentucky Constitution are not violated by House Bill 1, Sections 22-29.

That portion of House Bill 1 that establishes the Commission does violate Section 47 of the Kentucky Constitution. Section 47 requires revenue bills to originate in the House and permits the Senate to amend such bills only if, "no new matter . . . [is] introduced, under color of amendment, which does not relate to raising revenue." Ky. Const. Section 47. The Commission's purpose is to collect data on health services in Kentucky. This purpose is not limited to services funded by Medicaid but includes data collection on all health services. (House Bill 1, Section 23.)

In *Farris* v. *Shoppers Village Liquors, Inc.*, Ky., 669 S.W.2d 213, 213-214 (1984), the Kentucky Supreme Court decided a similar issue. In *Farris*, the Court considered a bill passed by the 1982 session of the General Assembly, "An Act Relating to Revenue and Taxation." This legislation established a 9 percent tax on the wholesale distribution of liquor and repealed a tax on the retail sale of liquor. A Senate amendment to the act established procedures for the sale and delivery of alcohol, specifying the information that must be recorded on invoices and requirements regarding the place of delivery. In *Farris*, the Supreme Court held that the Senate amendment did not relate to the subject matter of revenue and taxation and, therefore, violated Section 47 of the Kentucky Constitution.

The Senate amendment in this case is similarly unrelated to revenue and taxation. The Commission's authority to gather information applies to all health services performed in the state, not just Medicaid services. The Commission is authorized to collect data not only on cost but also on the "quality, and outcomes of health services." (House Bill 1, Section 23(1)). The Commission's mandate is as distinct from raising revenue as is the amendment in *Farris* setting out the data elements required for liquor invoices. The Commission's prescribed duties do not relate to raising revenue but to monitoring the medical treatment of every citizen in the state of Kentucky. Therefore, the Court finds that Sections 22-29 of House Bill 1 violate Section 47 of the Kentucky Constitution.

The two percent tax on physicians' gross revenues provided for in House Bill 1, Section 3 violates Section 59 of the Kentucky Constitution which prohibits special legislation. Section 59 provides, in pertinent part:

> The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely:
>
> . . . .
>
> Fifteenth: To authorize or to regulate the levy, the assessment or the collection of taxes, or to give any indulgence or discharge to any assessor or collector of taxes, or to his sureties.

The purpose of Section 59 is illuminated in *City of Louisville* v. *Kuntz*, Ky., 47 S.W. 592 (1989). In *Kuntz* at 593, the Court of Appeals described Section 59 as "a safeguard . . . for the protection of the weak as well as the strong" which prohibited "the legislature from discriminating in favor of or against individuals or classes." Special legislation is defined in *Board of Education of Jefferson County* v. *Board of Education of Louisville*, Ky., 472 S.W.2d 496, 498 (1971) as "legislation which arbitrarily or beyond reasonable justification discriminates against some persons or objects and favors others." In *Kling* v. *Geary*, Ky., 667 S.W.2d 379, 382 (1984), the Supreme Court held that there

is no special legislation "[w]here the legislature establishes a classification made upon a reasonable and natural distinction which relates logically to the purpose of the Act."

House Bill 1, Section 3 is not limited to the 60 percent of physicians participating in the Medicaid program but applies to the gross revenues of all physicians practicing medicine in Kentucky. This section constitutes special legislation, prohibited by Section 59 of the Kentucky Constitution. The classifications established in the Act are not based upon reasonable and natural distinctions and are not logically related to the purposes of the legislation. There is no reasonable basis to single out these health care providers to pay special taxes to support the Medicaid program. This program benefits the state's residents as a whole and there are no justifiable reasons for arbitrarily designating physicians to pay for it. Section 59 was designed to restrict the legislature from favoring or disfavoring particular groups, however advantageous it may be to do so. The increase in funding and the indirect benefit to 60 percent of physicians who participate in providing services for the program do not support a rationale for overcoming the proscriptions of Section 59 of the Kentucky Constitution. The classifications set up in House Bill 1 are not logically related to the purpose of the Act, which is to increase funding for the Medicaid program.

The Commonwealth is not simply complying with a mandated federal statutory scheme, but is rewriting the law to avoid loss of some federal funding. The Federal government does *not* require that providers be taxed but sets specific guidelines and limitations for states that decide to do so. Federal permission does not provide sufficient rationale to overcome Section 59 of the Kentucky Constitution.

Therefore the tax on the gross revenues of all physicians practicing in Kentucky in invalid. The same reasoning applies to physicians employed by HMO's. The salaries of physicians employed by HMO's may not be taxed under House Bill 1.

In light of this Court's determination that the tax on physicians violates Section 59 of the Kentucky Constitution, it is not necessary to address the issues of due process and equal protection.

HMO premiums may not be taxed under House Bill 1. The legislative history of House Bill 1 shows that the General Assembly never intended that HMO premiums be taxed. Prior to the bill's approval, Representative Billy Ray Smith proposed an amendment declaring that HMO premiums were not subject to the taxes imposed therein. In its Summary of Floor Amendments to the Second Committee Substitute to House Bill 1, the Legislative Research Commission noted that Smith's amendment was, "probably not necessary since it is fairly clear that HMO premiums would not be subject to the tax." (Summary of Floor Amendments, at 5.) In floor debates, Representative Ernesto Scorsone claimed that Smith's amendment was not needed. Representative Scorsone said, "[I]t's pretty clear that the only thing we are taxing are services. That's the only thing we can tax . . . so the HMO fee would not be taxed under this law." (Transcript of House Floor Debate of May 21, 1993.) Representative Smith withdrew his amendment after this statement. It is clear that the legislative intent was not to include HMO premiums among the provider taxes established in House Bill 1.

The provisions of House Bill 1 establishing the Health Care Data Commission and taxing physicians are unconstitutional. The General Assembly never intended that HMO's be taxed.

THEREFORE, it is the JUDGMENT of this Court that: (1) the Commission on Health Care Data Collection is ENJOINED from taking any action; (2) Plaintiffs' Motion requesting a Permanent Injunction enjoining the Revenue Cabinet from any further collection of taxes from plaintiff physicians or HMO's is GRANTED; and (3) the Revenue Cabinet is ORDERED to remit refunds on taxes already paid by plaintiff physicians and HMO's with 90 days of this Order.

So ORDERED this 23rd day of November, 1993.

There being no just reason for delay, this is a final and appealable JUDGMENT.

/s/ Roger L. Crittenden
Roger L. Crittenden
Judge, Franklin Circuit Court

SUPREME COURT OF KENTUCKY

93-SC-944-TG
93-SC-946-TG

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; HON. KIM BURSE, not individually but in her capacity as Secretary, Kentucky Revenue Cabinet; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; HON. FONTAINE BANKS, JR., not individually but in his capacity as Secretary, Kentucky Cabinet for Human Resources and KENTUCKY HEALTH CARE DATA COMMISSION - *Appellants*

v.

CHARLES C. SMITH, JR., M.D.; FRED L. BARNETT, M.D.; WILLIAM B. MONNIG, M.D.; and the KENTUCKY MEDICAL ASSOCIATIONS - - - - *Appellees*

- AND

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; HON. KIM BURSE, in her official capacity as Secretary, Kentucky Revenue Cabinet; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; HON. FONTAINE BANKS, JR., in his official capacity as Secretary of the Kentucky Cabinet for Human Resources and KENTUCKY HEALTH CARE DATA COMMISSION - *Appellants*

v.

STUART G. YEOMAN, M.D.; TIM HULSEY, M.D.; and JOE DAVIS, J.D.; President, on behalf of themselves and all other members, similarly situated of the WARREN COUNTY MEDICAL SOCIETY, an unincorporated association; and JOSEPH JANES - - - *Appellees*

AND

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; HON. KIM BURSE, in her official capacity as Secretary, Kentucky Revenue Cabinet; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; and HON. FONTAINE BANKS, JR., in his official capacity as Secretary, Kentucky Cabinet for Human Resources - - - *Appellants*

v.

HEALTH MAINTENANCE ORGANIZATION ASSOCIATION OF KENTUCKY, INC.; ALTERNATIVE HEALTH DELIVERY SYSTEMS; MIDWEST FOUNDATION INDEPENDENT PHYSICIANS ASSOCIATION d/b/a CHOICECARE; HEALTHWISE OF KENTUCKY, LTD.; HMPK, INC.; HPLAN, INC.; HUMANA HEALTH PLAN, INC.; SOUTHEASTERN GROUP, INC.; SOUTHEASTERN UNITED MEDIGROUP; and TAKECARE HEALTH PLAN OF OHIO, INC. - - *Appellees*

ORDER GRANTING TRANSFER

Movant's motions to transfer the above-styled appeals from the Court of Appeals to the Supreme Court are hereby granted.

The Court of Appeals shall immediately transmit to the Supreme Court the records in the above-styled actions.

Entered December 16, 1993

/s/ Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

93-SC-944-T
93-SC-946-T

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; HON. KIM BURSE, not individually but in her capacity as Secretary, Kentucky Revenue Cabinet; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; HON. FONTAINE BANKS, JR., not individually but in his capacity as Secretary, Kentucky Cabinet for Human Resources and KENTUCKY HEALTH CARE DATA COMMISSION - - *Movants*

v.

CHARLES C. SMITH, JR., M.D.; FRED L. BARNETT, M.D.; WILLIAM B. MONNIG, M.D.; and the KENTUCKY MEDICAL ASSOCIATIONS - - - *Respondents*

AND

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; HON. KIM BURSE, in her official capacity as Secretary, Kentucky Revenue Cabinet; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; HON. FONTAINE BANKS, JR., in his official capacity as Secretary of the Kentucky Cabinet for Human Resources and KENTUCKY HEALTH CARE DATA COMMISSION - - *Movants*

v.

STUART G. YEOMAN, M.D.; TIM HULSEY, M.D.; and JOE DAVIS, J.D.; President, on behalf of themselves and all other members, similarly situated of the WARREN COUNTY MEDICAL SOCIETY, an unincorporated association; and JOSEPH JANES - - *Respondents*

AND

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; HON. KIM BURSE, in her official capacity as Secretary, Kentucky Revenue Cabinet; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; and HON. FONTAINE BANKS, JR., in his official capacity as Secretary, Kentucky Cabinet for Human Resources - - - *Movants*

v.

HEALTH MAINTENANCE ORGANIZATION ASSOCIATION OF KENTUCKY, INC.; ALTERNATIVE HEALTH DELIVERY SYSTEMS; MIDWEST FOUNDATION INDEPENDENT PHYSICIANS ASSOCIATION d/b/a CHOICECARE; HEALTHWISE OF KENTUCKY, LTD.; HMPK, INC.; HPLAN, INC.; HUMANA HEALTH PLAN, INC.; SOUTHEASTERN GROUP, INC.; SOUTHEASTERN UNITED MEDIGROUP; and TAKECARE HEALTH PLAN OF OHIO, INC. - *Respondents*

NOTICE OF RECUSAL

The undersigned Justice of the Supreme Court of Kentucky hereby gives notice of his recusal from participation in the above styled and numbered cases.

As grounds for his recusal, the undersigned Justice states that he is a member of the governing board of Rockcastle Hospital and Respiratory Care Center, Inc., a non-profit Kentucky corporation which may be affected by the outcome of these proceedings. The foregoing is pursuant to SCR 4.300, Cannon 3C(1).

This the 15th day of December, 1993.

/s/ Joseph E. Lambert
Joseph E. Lambert
Justice, Supreme Court of Kentucky

SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY, Et Al., - - *Appellants,*

v.

CHARLES C. SMITH, M.D., Et Al., - - - - *Appellees.*

AND

COMMONWEALTH OF KENTUCKY, REVENUE CABINET, Et Al., - - - - - - - - - - *Appellants,*

v.

HEALTH MAINTENANCE ORGANIZATION ASSOCIATION OF KENTUCKY, INC., Et Al., - - - - *Appellees.*

NOTICE OF RECUSAL

Pursuant to Supreme Court Rule 4.300, Code of Judicial Conduct, Canon 3C(1) (and KRS 26A.015(2)(e)), the undersigned hereby gives notice of his recusal from any participation in the above-captioned proceedings, by reason of the fact that he is a member of the Board of Directors and of the Executive Committee of Trover Clinic Foundation, Inc., of Madisonville, Kentucky, a nonprofit corporation, and as such is involved in the matter of policy-making and operation of Regional Medical Center of Hopkins County, Kentucky, a Kentucky nonprofit hospital corporation, and said Regional Medical Center of Hopkins County, Kentucky, is a member of the Kentucky Hospital Association, Inc., which is a party plaintiff in a related case now pending in the Franklin Circuit Court, Civil Action No. 93-CI-01460, which is expected shortly to reach this Court and which invloves identical or similar issues to those involved in the within cases.

This December 15, 1993.

/s/ Thomas B. Spain
Thomas B. Spain
Justice, Kentucky Supreme Court

SUPREME COURT OF KENTUCKY

93-SC-944-T
93-SC-946-T

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; HON. KIM BURSE, not individually but in her capacity as Secretary, Kentucky Revenue Cabinet; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; HON. FONTAINE BANKS, JR., not individually but in his capacity as Secretary, Kentucky Cabinet for Human Resources and KENTUCKY HEALTH CARE DATA COMMISSION - - *Movants*

v.

CHARLES C. SMITH, JR., M.D.; FRED L. BARNETT, M.D.; WILLIAM B. MONNIG, M.D.; and the KENTUCKY MEDICAL ASSOCIATIONS - - - *Respondents*

AND

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; HON. KIM BURSE, in her official capacity as Secretary, Kentucky Revenue Cabinet; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; HON. FONTAINE BANKS, JR., in his official capacity as Secretary of the Kentucky Cabinet for Human Resources and KENTUCKY HEALTH CARE DATA COMMISSION - - *Movants*

v.

STUART G. YEOMAN, M.D.; TIM HULSEY, M.D.; and JOE DAVIS, J.D.; President, on behalf of themselves and all other members, similarly situated of the WARREN COUNTY MEDICAL SOCIETY, an unincorporated association; and JOSEPH JANES - - *Respondents*

AND

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; HON. KIM BURSE, in her official capacity as Secretary, Kentucky Revenue Cabinet; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; and HON. FONTAINE BANKS, JR., in his official capacity as Secretary, Kentucky Cabinet for Human Resources - - - *Movants*

v.

HEALTH MAINTENANCE ORGANIZATION ASSOCIATION OF KENTUCKY, INC.; ALTERNATIVE HEALTH DELIVERY SYSTEMS; MIDWEST FOUNDATION INDEPENDENT PHYSICIANS ASSOCIATION d/b/a CHOICECARE; HEALTHWISE OF KENTUCKY, LTD.; HMPK, INC.; HPLAN, INC.; HUMANA HEALTH PLAN, INC.; SOUTHEASTERN GROUP, INC.; SOUTHEASTERN UNITED MEDIGROUP; and TAKECARE HEALTH PLAN OF OHIO, INC. - *Respondents*

ORDER

Pursuant to KRS 26A.015, Justice Charles M. Leibson hereby recuses from the above-styled appeals and requests that a Special Justice be appointed in this case.

The reason for recusal is because the lead plaintiff in 93-SC-944-T is Dr. Charles C. Smith, Jr., my personal physician.

ENTERED: December 15, 1993.

/s/ Charles M. Leibson
Justice Charles M. Leibson

[LETTERHEAD OF BRERETON C. JONES,
GOVERNOR, COMMONWEALTH OF KENTUCKY]

EXECUTIVE ORDER

94 - 25

[Received February 1, 1994]

January 6, 1994

Pursuant to the authority vested in me by Section 110(3) of the Constitution of the Commonwealth of Kentucky, I hereby appoint, as Special Justices to the Supreme Court of Kentucky for the purpose of hearing and deciding *Commonwealth of Kentucky, Revenue Cabinet, et al.* v. *Charles C. Smith, Jr., M.D., et al. and Commonwealth of Kentucky, Revenue Cabinet, et al.* v. *Stuart G. Yeoman, M.D., et al.* (No. 93-SC-944-T and No. 93-SC-946-T), the following:

Ben S. Fletcher III
317 West Ninth Street
Hopkinsville, Kentucky 42240

Stephen C. Cawood
206 Kentucky Avenue
Pineville, Kentucky 40977

Sheryl G. Snyder
1616 Cherokee Road
Louisville, Kentucky 40205

/s/ Brereton C. Jones
Brereton C. Jones, Governor
Commonwealth of Kentucky

/s/ Bob Babbage
Bob Babbage
Secretary of State

[LETTERHEAD OF I.C.H. CORPORATION]

February 9, 1994

Via Facsimile

The Honorable Brereton Jones
Governor of Kentucky
State Capitol
Frankfort, KY 40601

Dear Governor Jones:

I am writing to decline the appointment as a Special Justice of the Supreme Court of Kentucky in *Commonwealth of Kentucky* v. *Smith, et al.*, No. 93-SC-946-T.

It has come to my attention today that the state Board of Realtors has issued a request for proposals for the errors and omissions insurance coverage of realtors licensed by the Board, a contract presently held by a wholly-owned, indirect subsidiary of I.C.H. Corporation. The specifications for the contract are written by the independent Board of Realtors, and the contract is competitively bid, but under the procurement code the successful bidder is to be determined by the Finance and Administration Cabinet.

I regret that I was unaware at the time of my initial acceptance of the appointment as a Special Justice that this request for proposals would be subsequently issued. I have no role in bidding for or administering this contract, and was therefore unaware that the RFP had been issued until it was brought to my attention today in connection with my appointment as a Special Justice. While this contract is totally unrelated to the case and is with my employer not with me, it will be awarded in chronological proximity to the decision in the above-referenced case.

I very much appreciate the honor you afforded me by considering me to sit in this case. My role as an appellate advocate in a number of the precedents cited by both par-

ties made the case particularly interesting to me, and I regret that I will miss this opportunity. However, I think it is better for the Court and the Commonwealth that tangential issues be eliminated so that the public and the litigants can have confidence in the process by which the case is decided.

Sincerely,

/s/ Sheryl
Sheryl G. Snyder

SGS/hah/letters

copies via facsimile:

Honorable Robert F. Stephens
Leonard G. Rowekamp
Cathy Cravens Snell
Charles J. Cronan IV
Bruce F. Clark
Kent Masterson Brown

[LETTERHEAD OF BRERETON C. JONES,
GOVERNOR, COMMONWEALTH OF KENTUCKY]

EXECUTIVE ORDER

94 - 176

[Received February 15, 1994]

February 15, 1994

Pursuant to the authority vested in me by Section 110(3) of the Constitution of the Commonwealth of Kentucky, I hereby appoint, R. Kent Westberry, Attorney at Law, 220 West Main, Louisville, Kentucky 40202, as Special Justice to the Supreme Court of Kentucky for the purposes of hearing and deciding *Commonwealth of Kentucky, Revenue Cabinet, et al.* v. *Charles C. Smith, Jr., M.D., et al. and Commonwealth of Kentucky, Revenue Cabinet, et al.* v. *Stuart G. Yeoman, M.D., et al.* (No. 93-SC-944-T and No. 93-SC-946-T).

/s/ Brereton C. Jones
Brereton C. Jones, Governor
Commonwealth of Kentucky

/s/ Bob Babbage
Bob Babbage
Secretary of State

SUPREME COURT OF KENTUCKY

93-SC-000946-TG

COMMONWEALTH OF KENTUCKY, REVENUE CABINET;
KIM BURSE, in her official capacity as Secretary;
KENTUCKY REVENUE CABINET; COMMONWEALTH OF
KENTUCKY, CABINET FOR HUMAN RESOURCES;
FONTAINE BANKS, JR., in his official capacity as
Secretary; KENTUCKY CABINET FOR HUMAN
RESOURCES; KENTUCKY HEALTH CARE DATE[sic]
COMMISSION - - - - - - - - - - *Movants*

v.

CHARLES C. SMITH, JR., M.D.;
FRED L. BARNETT, M.D.;
WILLIAM B. MONNIG, M.D.;
KENTUCKY MEDICAL ASSOCIATION;
STUART G. YEOMAN, M.D.;
TIM HULSEY, M.D.;
JOE DAVIS, M.D., President, Warren County
Medical Society;
JOSEPH JANES - - - - - - - - - - *Respondents*

Appeal From Court of Appeals
No. 93-CA-002840
(Franklin Circuit Court No. 93-CI-000959)

ORDER

Special Justice Ben S. Fletcher, III, appointed to the Court by Governor Jones, pursuant to Ky. Const. §110(3), for the purpose of filling a vacancy following the recusal of Hon. Thomas B. Spain, 1st Supreme Court District, in this matter, hereby declines to recuse himself from participation in the above-styled action. There is no reason necessitating his disqualification pursuant to KRS 26A.015 or SCR 4.300, from service herein.

ENTERED February 16, 1994.

/s/ Ben S. Fletcher, III
Special Justice Fletcher

SUPREME COURT OF KENTUCKY

93-SC-000946-TG

COMMONWEALTH OF KENTUCKY, REVENUE CABINET;
KIM BURSE, in her official capacity as Secretary;
KENTUCKY REVENUE CABINET; COMMONWEALTH OF
KENTUCKY, CABINET FOR HUMAN RESOURCES;
FONTAINE BANKS, JR., in his official capacity as
Secretary; KENTUCKY CABINET FOR HUMAN
RESOURCES; KENTUCKY HEALTH CARE DATE[sic]
COMMISSION - - - - - - - - - - *Movants*

v.

CHARLES C. SMITH, JR., M.D.;
FRED L. BARNETT, M.D.;
WILLIAM B. MONNIG, M.D.;
KENTUCKY MEDICAL ASSOCIATION;
STUART G. YEOMAN, M.D.;
TIM HULSEY, M.D.;
JOE DAVIS, M.D., President, Warren County
Medical Society;
JOSEPH JANES - - - - - - - - - - *Respondents*

Appeal From Court of Appeals
No. 93-CA-002840
(Franklin Circuit Court No. 93-CI-000959)

ORDER

Special Justice R. Kent Westberry, appointed to the Court by Governor Jones, pursuant to Ky. Const. §110(3), for the purpose of filling a vacancy following the recusal of Hon. Charles M. Leibson, 4th Supreme Court District, in this matter, hereby declines to recuse himself from participation in the above-styled action. There is no reason necessitating his disqualification pursuant to KRS 26A.015 or SCR 4.300, from service herein.

ENTERED February 16, 1994.

/s/ R. Kent Westberry
Special Justice Westberry

SUPREME COURT OF KENTUCKY

93-SC-000946-TG

COMMONWEALTH OF KENTUCKY, REVENUE CABINET; KIM BURSE, in her official capacity as Secretary; KENTUCKY REVENUE CABINET; COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES; FONTAINE BANKS, JR., in his official capacity as Secretary; KENTUCKY CABINET FOR HUMAN RESOURCES; KENTUCKY HEALTH CARE DATE[sic] COMMISSION - - - - - - - - - - *Movants*

v.

CHARLES C. SMITH, JR., M.D.;
FRED L. BARNETT, M.D.;
WILLIAM B. MONNIG, M.D.;
KENTUCKY MEDICAL ASSOCIATION;
STUART G. YEOMAN, M.D.;
TIM HULSEY, M.D.;
JOE DAVIS, M.D., President, Warren County Medical Society;
JOSEPH JANES - - - - - - - - - - *Respondents*

Appeal From Court of Appeals
No. 93-CA-002840
(Franklin Circuit Court No. 93-CI-000959)

ORDER

Special Justice Stephen C. Cawood, appointed to the Court by Governor Jones, pursuant to Ky. Const. §110(3), for the purpose of filling a vacancy following the recusal of Hon. Joseph E. Lambert, 3rd Supreme Court District, in this matter, hereby declines to recuse himself from participation in the above-styled action. There is no reason necessitating his disqualification pursuant to KRS 26A.015 or SCR 4.300, from service herein.

ENTERED February 16, 1994.

/s/ Stephen C. Cawood
Special Justice Cawood

SUPREME COURT OF KENTUCKY

93-SC-000946-TG

COMMONWEALTH OF KENTUCKY, REVENUE CABINET;
KIM BURSE, in her official capacity as Secretary;
KENTUCKY REVENUE CABINET; COMMONWEALTH OF
KENTUCKY, CABINET FOR HUMAN RESOURCES;
FONTAINE BANKS, JR., in his official capacity as
Secretary; KENTUCKY CABINET FOR HUMAN
RESOURCES; KENTUCKY HEALTH CARE DATE[sic]
COMMISSION - - - - - - - - - - *Movants*

v.

CHARLES C. SMITH, JR., M.D.;
FRED L. BARNETT, M.D.;
WILLIAM B. MONNIG, M.D.;
KENTUCKY MEDICAL ASSOCIATION;
STUART G. YEOMAN, M.D.;
TIM HULSEY, M.D.;
JOE DAVIS, M.D., President, Warren County
Medical Society;
JOSEPH JANES - - - - - - - - - - *Respondents*

Appeal From Court of Appeals
No. 93-CA-002840
(Franklin Circuit Court No. 93-CI-000959)

ORDER

Pursuant to Ky. Const. §110, when Justices Lambert, Leibson and Spain of this Court declined to sit in the above-styled action, such fact was certified to the Governor who then appointed three Special Justices, Hon. Stephen C. Cawood, Hon. Sheryl G. Snyder, and Hon. Ben S. Fletcher, III, to constitute a full court for the trial of this cause.

In the interest of avoiding any appearance of impropriety on his part, Hon. Sheryl G. Snyder declined the Governor's appointment as a Special Justice of the Supreme Court of Kentucky in *Commonwealth of Kentucky, et al. v. Smith, et al.*, No. 93-SC-946-TG. Therefore,

appellees' motion to recuse Hon. Sheryl G. Snyder is denied as being moot.

On February 15, 1994, Hon. R. Kent Westberry was appointed by the Governor to sit as a Special Justice for the 4th Supreme Court District in the trial of the cause.

Special Justices Cawood, Fletcher and Westberry have been sworn into office by the undersigned as of this date and have declined to recuse themselves from participation in this appeal, no facts having been disclosed of a personal, substantial or pecuniary interest in the case which mandate their disqualification pursuant to SCR 4.300 or KRS 26A.015. As the specific language of KRS 26A.015(2) and SCR 4.300 Canons 1, 2, and 3, is directive to the individual justice, the decision to recuse oneself from participation in an action before the Supreme Court of Kentucky or, to decline to do so, is to be made by the individual justice and not the Court. Appellees' motion for the Court to order the recusal of Special Justices Cawood, Fletcher and Westberry is therefore denied.

Stephens, C.J., Reynolds, Stumbo and Wintersheimer, JJ., and Cawood, Fletcher and Westberry, S.J., sitting. All concur.

ENTERED February 16, 1994.

/s/ Robert F. Stephens
Chief Justice

RENDERED: MARCH 24, 1994
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY, REVENUE CABINET;
KIM BURSE, in her official capacity as Secretary;
KENTUCKY REVENUE CABINET; COMMONWEALTH OF
KENTUCKY, CABINET FOR HUMAN RESOURCES;
FONTAINE BANKS, JR., in his official capacity as
Secretary; KENTUCKY CABINET FOR HUMAN
RESOURCES; KENTUCKY HEALTH CARE DATE[sic]
COMMISSION - - - - - - - - - *Appellants*

v.

CHARLES C. SMITH, JR., M.D.;
FRED L. BARNETT, M.D.;
WILLIAM B. MONNIG, M.D.;
KENTUCKY MEDICAL ASSOCIATION;
STUART G. YEOMAN, M.D.;
TIM HULSEY, M.D.;
JOE DAVIS, M.D., President, Warren County
Medical Society;
JOSEPH JANES - - - - - - - - - *Appellees*

On Transfer From Court of Appeals
No. 93-CA-002840
(Franklin Circuit Court No. 93-CI-000959)

OPINION OF THE COURT BY JUSTICE REYNOLDS
REVERSING

This appeal is from the final judgment of Franklin Circuit Court for which transfer was granted. CR 74.02. The enactment of House Bill 1, "the provider tax," (codified as KRS 142.201-142.259 and KRS 216.270-216.287), was the subject and product of an extraordinary session of the 1993 Kentucky General Assembly. The trial court determined that a tax on physicians violated Section 59(15) of the Kentucky Constitution. To the extent provided in this

opinion, we reverse the lower court's decision and hold that the health care provider tax as applied to physicians is constitutional.

Under the Medicaid program, of the 7,132 Kentucky licensed physicians and clinics, 4,514 treat and provide services to Medicaid patients. Under House Bill 1, a 2 percent of gross revenue tax was imposed on physicians' services and the tax proceeds are utilized to obtain federal matching money to support Kentucky Medicaid. Thirty-one percent of the state's share of the Medicaid expenditures is derived from the providers' tax monies which are available for the matching funds. The state's general fund provides the rest of the state's share. The question is whether the General Assembly lacks the ability to define the class of providers being taxed.

It is neither the wisdom or expediency of this legislation that concerns the court, for that is a matter for the legislative branch of our government. The sole duty herein is scrutiny of the act in light of the constitution.

It is the specter of unconstitutional classification that has formed the basis of appellees' argument. The broad discretion as to classification which a legislature possesses in the field of taxation has long been recognized. Discretion is needed in the formation of basic and sound tax policies and classification is appropriate for fitting tax programs to both usages and needs. It has been held, because of these factors, that in taxation, more so than in other fields, the legislative bodies possess the greatest of freedom in classification. *Madden* v. *Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940). Courts, under a rational basis review, accept the legislature's generalizations even when there is an imperfect fit between means and ends. *Heller* v. *Doe By Doe*, __ U.S. __, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Further, in a taxation case, unless a rational basis for such law can be completely refuted, then the law may stand as constitutional. Notably, the burden on the ones attacking the legislative tax arrangement is the negation of every conceivable basis which might support it.

Vital state interest does, in fact, in this case mean vital state interest as this state provides medical care to over 500,000 Kentuckians, which is over 14 percent of this state's citizenry, under the provisions of the Kentucky Medical Assistance Program (Medicaid). There is an established federal criteria for states to obtain federal matching funds for the Medicaid program and it was amended in 1991, necessitating a state change. Therefore, to qualify for federal matching money, any tax on health care providers was required to be uniform and broad based within each class of taxed providers. Omitted was the ruse of hold harmless provisions whereby the participating physicians were permitted recoupment.

In this case, were the state to run afoul by imposing a tax considered impermissible under the federal regulations, there would occur a reduction of the state's total medical assistance by the amount of any impermissible health care tax that is collected. This act under consideration applies to *all permissible health care providers,* whether or not they participate in the Medicaid program, and complies with federal criteria because of its uniformity and broad base. The annual provider tax revenues generated by the act have been legislatively estimated to be approximately $147 million, of which $32.4 million is attributable to the tax on physicians.

Franklin Circuit Court reasoned that the 2 percent tax on physicians' gross revenues provided for in House Bill 1 violated Section 59 of the Kentucky Constitution, which prohibits special legislation, and utilized the cases of *City of Louisville* v. *Kuntz,* 104 Ky. 584, 47 S.W. 592 (1898) and *Board of Educ. of Jefferson Co.* v. *Board of Educ. of Louisville,* Ky., 472 S.W.2d 496 (1971), as supportive of its position. Noted, but without discussion, was that the tax was not limited to 60 percent of the physicians that participated in the Medicaid program, but applied to all physicians rendering health care services in the state. Thus, it was concluded that the increase in funding and the indirect benefit to only 60 percent of the doctors who did participate in providing services did not support a rationale

for overcoming Kentucky Constitution Section 59(15). The classifications were deemed to be illogically related to the purpose of the act. We find such conclusion unacceptable.

The enacted legislation and federal criteria as to qualification for federal matching money forms a rational basis in the General Assembly's actions resulting in House Bill 1. These federal mandates were not illusionary, but were real and pressing at the time of the legislation. Simply put, the Kentucky statute was designed to meet the federal statute which provides and enumerates the specific requirements as to the class of health care providers that may be taxed in order to qualify for matching funds. The trial court was in error by finding the classifications illogically related to the purpose of the act.

The mammoth scope of the Medicaid program provides such an enormous subsidy to the health care system so as to benefit all health care providers, whether they participate in direct reimbursement provisions or not. It follows that it is not illogical for the General Assembly to tax the health care industry for 31-plus percent of the state's funds which are to match the scope of the much larger federal funds. The prevalence of provider taxes serves to establish the perimeters of the class providers who could be taxed to fund Medicaid. The Kentucky statute, as the parties appear to concede, is coextensive with the federal law. Thus, when a state elects to enact a provider tax, its discretion in classifying those who will be taxed appears circumscribed by federal law. Thus, defining the class in a coextensive manner with the federal law results in a rational basis for such classification without arbitrariness. The act delineates the class of entities subject to the tax and, thus, the General Assembly necessarily excludes and includes certain entities within the scope of the tax. Judicial approval given to legislative classifications for tax purposes appears to be well established. *Department of Revenue* v. *Spalding Laundry and Dry Cleaning Co.*, Ky., 436 S.W.2d 522 (1969).

It has been further established that classification is permissible when it appears as a natural method of legis-

lation, as long as the classification is neither unreasonable nor arbitrary and, thus, applies equally to all in a class. *Schoo* v. *Rose*, Ky., 270 S.W.2d 940 (1954). A requisite, therefore, is the rationality of the basis as between the classification established and the governmental purpose to be achieved. As there is no suspect classification in this case, the act meets the rational basis standard to be deemed constitutional.

Section 59(15) of the Kentucky Constitution prohibits "local or special acts" which are "to authorize or regulate the levy, the assessment or the collection of taxes . . . ." The primary purpose of Section 59 and the 29 subsections is the protection of Kentucky's citizenry from special interest groups. *Tabler* v. *Wallace*, Ky., 704 S.W.2d 179 (1985), *cert. denied*, 479 U.S. 822, 107 S.Ct. 89, 93 L.Ed.2d 41 (1986). Reasons of a positive nature are necessary for justifying the legislation.

To overcome freedom of classification and the presumption of validity requires an explicit demonstration that a tax is hostile and oppressive against particular persons and classes. *Delta Air Lines, Inc.* v. *Com., Revenue Cabinet*, Ky., 689 S.W.2d 14 (1985). State tax statutes provide many examples of classifications and due process, and equal protection analysis in tax matters requires the court to determine simply whether there is a rational basis for the legislative action. *Federal Communications Commission* v. *Beach Communications, Inc.*, __ U.S. __, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *Reynolds Metal Co.* v. *Martin*, 269 Ky. 378, 107 S.W.2d 251 (1937).

The populace, as a whole, derives benefits from a healthy citizenry. The providers of health care may receive immediate and direct results of a fund that pays their charges/fees for treatment of the indigent. No physician taxed is prohibited from participating in the Medicaid program, but some voluntarily do not participate. Recognizing such, the General Assembly afforded the ability to participate in Medicaid a necessary prerequisite to being subject to the tax.

Supportive of a class legislation is the public purpose of indigent care which forms a reasonable basis for levying a tax on such classes enumerated by the federal government. The legislature, in this case, has acted within the classification perimeters and, in effect, resisted the overtures of health care lobbyists by their revision of the health care provider tax to be used as a portion of the state's matching funds for the federal Medicaid funds. House Bill 1 addresses a completely different legislative situation than the *Tabler* court addressed.

The Florida Supreme Court in the case of *Coy* v. *Florida Birth-Related Neurological Injury Compensation Plan,* 595 So.2d 943 (Fla. 1992), determined there was a rational relationship of a health care related tax imposed on all licensed physicians, not merely obstetricians, to fund a state-wide program which compensates victims of birth-related neurological injuries, despite the fact that not all physicians taxed were obstetricians who would benefit. The basic rationale, in part, is the relationship of a tax to the delivery of health care in general. Herein, all physicians taxed under House Bill 1 may participate in the Medicaid program and receive direct benefits. It is natural and reasonable that the 40 percent of the physicians who pay the tax but do not participate in the Medicaid program may continue their type of practice with a diminished strain on the hospital system. Said otherwise, the 40 percent of the physicians are not in a vacuum in relation to the 60 percent, and there is a rational interrelationship between the two percentages of physicians, with each group having real benefits.

Standards applicable are succinctly stated in Justice Wintersheimer's concurring opinion in *Gillis* v. *Yount,* Ky., 748 S.W.2d 357 (1988), which follows:

> Constitutional limitations prohibit only such classification which is not [sic] arbitrary and unreasonable and has no fair and substantial relation to the permissible governmental purpose of the legislation. The classification for taxation is a policy matter for legislative determination. Ordinarily the judgment of the

> legislature is to be deferred to if there is any just and reasonable basis to support such a decision. The question then becomes whether it was arbitrary and reasonable for the legislature to create a separate classification . . . . (Citation omitted).

Appellees have argued that the provider tax is unconstitutional because the legislature should have enacted a more broadly based tax, the argument being that a classification is unconstitutional as being special legislation if a more general law could have been enacted. Section 59(29) merely adds to the list of 28 prohibitions and states: "In all other cases where general law can be made applicable, no special law shall be enacted." Thus, the legislation must first be special (arbitrary) under the *Gillis* v. *Yount* test, but relate to a subject not covered in the 28 enumerated subsections for Section 59(29) to be applicable. Stated otherwise, any law not as broad as might be envisioned would be unconstitutional. The fact that an alternative is available to the legislature does not render unconstitutional the alternative which has been chosen by the legislature. For example, the progressive income tax would be unconstitutional, as well as all exemptions from the sales tax. When taken to an extreme, this argument would deprive a legislature of any discretion in making classifications for taxation and from creating exemptions.

The enactment of a state statutory plan based on a voluntary federal statutory plan was determined to be general legislation and constitutional under Section 59. *See Waggoner* v. *Waggoner*, Ky., 846 S.W.2d 704 (1993), *cert. denied*, __ U.S. __, 114 S.Ct. 346, 126 L.Ed.2d 310 (1993). *Waggoner* further provides that the fact that the legislature deals with a special subject does not *per se* make it special legislation. *See Kentucky Milk Marketing and Anti-Monopoly Commission* v. *Borden Co.*, Ky., 456 S.W.2d 831 (1970). A general law relates to persons or things as a class, while a special law relates to particular persons or things of a class, per *Waggoner*. The tax in this case imposed upon the physicians, a federally defined class, meets the definition of a general law. The appellees' argument of an underinclusive class is not persuasive.

The rational basis for enacting this legislation is referenced in this record and existed at the time of the statute's enactment.

Sections 1, 2 and 3 of the Kentucky Constitution embrace the equal protection clause of the Fourteenth Amendment to the United States Constitution. While the circuit court omitted any reference/basis for its decision as to whether House Bill 1 violates principles of due process and equal protection, we find that by meeting the test of Section 59, House Bill 1 also meets the test of Sections 2 And 3 of the Kentucky Constitution. Such concern was addressed in *Revenue Cabinet* v. *Estate of Marshall,* Ky. App., 746 S.W.2d 408 (1988), which holds that classifications were not *per se* unreasonable since a rational basis has been determined for the classifications. Moreover, the *Tabler* court found Section 59 of the Kentucky Constitution to be more than simply restating the generalized language of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Justification under Section 59 equates to reasonable justification under Sections 2 and 3 of the Kentucky Constitution.

A cross-appeal, pursuant to CR 74.01, was not filed herein, but has been included among the issues discussed by appellees. The title of House Bill 1 was styled: "An Act relating to health and safety, providing for revenues to finance health care, making appropriations, and declaring an emergency." Violation of Section 51 of the Kentucky Constitution was raised in that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title. . . ." Construction of this section has found a liberal course with all doubts as to compliance resolved in favor of the validity of the legislative action. *Commonwealth ex rel. Armstrong* v. *Collins,* Ky., 709 S.W.2d 437 (1986). Continuing, if the title furnishes a "clue" to the act's contents, it may pass constitutional muster. *See Talbott, Auditor of Pub. Accts.* v. *Laffoon,* 257 Ky. 773, 79 S.W.2d 244 (1934). Further illustrative are the cases of *District Bd. of Tuberculosis Sanatorium Trustees of Fayette Co.* v. *Bradley,* 188 Ky. 426, 222 S.W.

518 (1920); *Anderson* v. *Wayne Co.*, 310 Ky. 597, 221 S.W.2d 429 (1949); and *Dawson* v. *Com., Dept. of Transp.*, Ky., 622 S.W.2d 212 (1981). We suggest that a party reading the title to House Bill 1 might conclude that a tax was being imposed to finance health care as it stated ". . . providing for revenues to finance health care . . . ." This argument concerning misinformation is without merit due to the fact that the appellees were also in attendance during the hearing and the special legislative session. Their presence, coupled with high media visibility and debates, makes it hard to conclude that this legislation comports with the intent of the constitutional framers to invalidate the statute on the ground that its title is not sufficiently descriptive.

We do not find that a benefit/burden analysis forms a basis of support for the providers, *Sims* v. *Board of Educ. of Jefferson Co., Ky.*, Ky., 290 S.W.2d 491 (1956), nor does Section 59(15) of the Kentucky Constitution require exactingly equal treatment. In essence, unequal treatment has been acceptable. *Reynolds Metal Co.* v. *Martin, supra.*

The appellants agree that the circuit court properly severed Sections 22 through 29 of House Bill 1. Therefore, this matter is a nonissue as it is neither essential to, nor inseparable from the other provisions of House Bill 1.

The appellees' motion for the recusal of the three special justices of this court was passed to the merits. The appointment by the governor of three special justices under Section 110(3) of the Kentucky Constitution was occasioned by the recusal of three sitting justices, which appellees now deem to be violative of that section, which provides:

> A majority of the justices of the Supreme Court shall constitute a quorum for the transaction of business. *If as many as two justices* decline or are unable to sit in the trial of any cause, the chief justice shall certify that fact to the governor, who shall appoint to try the particular cause *a sufficient number of justices to constitute a full court* for the trial of the cause.

The language of this constitutional section, deemed limiting, simply does not lead to the interpretation advanced by appellees. To resolve a limiting doubt, if any, one may read and consider, in its entirety, the language in Section 110(3), which provides that the governor "shall appoint to try the particular cause a sufficient number of justices to constitute a full court . . . ." We resolve that a gubernatorial appointment under this section arises from the necessity to appoint two or more special justices, the number of vacancies of two or more being the determinative factor for appointment.

The phraseology which appellees attribute to *Kentucky Utilities Co.* v. *South East Coal Co.*, Ky., 836 S.W.2d 407, (1992), *cert. dismissed*, __ U.S. __, 113 S.Ct. 1147, 122 L.Ed.2d 498 (1993), does not flow therefrom in a manner or with a meaning that inhibits the gubernatorial appointment of two justices or a sufficient number that would constitute a full court. The Supreme Court Rules neither address nor provide for the appointment of more than one justice. *Kentucky Utilities, supra,* addressed the authority and manner of appointment when only one justice was disqualified. *Ex parte Auditor of Public Accounts,* Ky., 609 S.W.2d 682, 685 (1980) states this court's position as to the filling of vacancies when two or more justices are recused:

> The constitutional check-and-balance relationship between the executive and judicial branches of the government consists of the provisions for filling vacancies in judicial offices and for the appointment of temporary substitutes *when two or more justices of the Supreme Court decline or are unable to participate in the disposition of a cause pending before that court.* Const. Secs. 118, 110(3). Those relationships between the legislature and judicial branches exist by virtue of Const. Secs. 110(4), 111(1), 112(2) and (3) and 113(2) and (3), pertaining to judicial districts and number of judges and justices; . . .

This direction has continued to be recognized and followed consistently in those situations requiring the appointment of two or more special justices. *See J.C.J.D.* v. *R.J.C.R.*, Ky., 803 S.W.2d 953 (1991), wherein all justices

of the Supreme Court and the disposition of the particular case was decided by seven special justices, appointed by the governor, pursuant to Constitutional Section 110(3), to constitute a full court. The gubernatorial appointment of a "special" justice to the Supreme Court is further addressed in KRS 21A.120(1).

No argument has been sufficiently advanced as to raise an infirmity under the federal and state constitution which results from the governor's fulfilling his duties of judicial appointment under Section 110(3). Neither is there a necessity to develop a convoluted construction supportive of Section 110(3). We acknowledge the argument which has been advanced by the providers pertaining to the governor's active participation in the question of health care reform. The allegation of the appointment of "tainted" special justices ignores those constitutional sections which require the governor to make appointments in light of his constitutional duties. We believe that the question of recusal of each individual special justice has been addressed in this record and was determined as stated in the concurring opinion of *Kentucky Utilities*. Thus, recusal is a personal matter to be decided by each individual justice in the absence of any so-called *per se* disqualification or statutory prohibition.

The appellees' challenges extend even further and relate to the governor, his relationship to and interest in the legislation, political association with the appointees, and the like. Suffice it to say that the affidavits at no point make allegations of impropriety against the three sitting special justices nor have specific allegations of bias or prejudice been raised against them. Special justices and regular justices, when no valid reasons for recusation exist, have a duty to sit. *See Pessin* v. *Keeneland Ass'n*, 274 F.Supp. 513 (Ky. 1967); *Foster* v. *Commonwealth*, Ky., 348 S.W.2d 759 (1961), *cert. denied* 368 U.S. 993, 82 S.Ct. 613, – 7 L.Ed.2d 530 (1962).

To the extent provided in this opinion, we reverse the lower court's decision and hold that the health care provider tax as applied to physicians is constitutional.

Stephens, C. J., Special Justice S. Cawood, Special Justice B. Fletcher III, and Special Justice R. Westberry concur.

Stumbo, J., dissents by separate opinion in which Wintersheimer, J. joins.

Wintersheimer, J., concurs in part and dissents in part by separate opinion in which Stumbo, J. joins.

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RENDERED: MARCH 24, 1994
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY, REVENUE CABINET;
KIM BURSE, in her official capacity as Secretary;
KENTUCKY REVENUE CABINET; COMMONWEALTH OF
KENTUCKY, CABINET FOR HUMAN RESOURCES;
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Secretary; KENTUCKY CABINET FOR HUMAN
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COMMISSION - - - - - - - - - - *Appellants*

v.

CHARLES C. SMITH, JR., M.D.;
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STUART G. YEOMAN, M.D.;
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JOSEPH JANES - - - - - - - - - - *Appellees*

On Transfer From Court of Appeals
No. 93-CA-002840
(Franklin Circuit Court No. 93-CI-000959)

DISSENTING OPINION BY JUSTICE STUMBO

Respectfully, and with some reluctance, I must dissent. I agree with the majority opinion's excellent analysis as to the constitutionality of taxing those involved in health care as a class for the purpose of obtaining federal funding to support Kentucky Medicaid. It is the disparate treatment of the subclasses by House Bill 1 that I find unacceptable.

House Bill 1 (codified as KRS 142.201-142.259 and KRS 216.270-216.287) sets up three classes of health care providers which are taxed at different rates, and one of which

is permitted to "pass on" to the recipient of the taxable item or service the tax imposed. Hospitals are taxed at a rate of 2½ percent of gross revenues. KRS 142.202. Health care providers other than hospitals (e.g., physicians, health maintenance organizations, nursing homes for the mentally retarded, and others) are taxed at the rate of 2 percent of the gross revenues. KRS 142.207. Pharmacies and others dispensing out-patient prescription drugs are taxed at the rate of 25 cents per prescription. KRS 142.211. Of this last class, only pharmacies are permitted to pass the tax on to insurers, health maintenance organizations, and non-profit hospital and health service corporations. KRS 142.211(1)(a).

Physicians can, and do, dispense out-patient prescriptions, yet they are forbidden to pass on the 25 cent tax that pharmacies are permitted to pass on. KRS 142.213(1). Additionally, pharmacies are permitted to pass on the same tax to a provider, as defined by KRS 142.207, already subject to taxation; that is, a health maintenance organization which in turn is forbidden to pass on the tax. The result is that a health maintenance organization pays both the 2 percent tax on its gross income and the 25 cent per prescription tax passed through it by the pharmacies. Thus, two members of the same subclass are treated differently. These differences compel me to conclude that these subclassifications are unreasonable and arbitrary in that the members of the subclasses are not treated equally. *Schoo* v. *Rose*, Ky., 270 S.W.2d 940 (1954).

Wintersheimer, J., joins in this dissent.

RENDERED: MARCH 24, 1994
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY, REVENUE CABINET;
KIM BURSE, in her official capacity as Secretary;
KENTUCKY REVENUE CABINET; COMMONWEALTH OF
KENTUCKY, CABINET FOR HUMAN RESOURCES;
FONTAINE BANKS, JR., in his official capacity as
Secretary; KENTUCKY CABINET FOR HUMAN
RESOURCES; KENTUCKY HEALTH CARE DATE[sic]
COMMISSION - - - - - - - - - - *Appellants*

v.

CHARLES C. SMITH, JR., M.D.;
FRED L. BARNETT, M.D.;
WILLIAM B. MONNIG, M.D.;
KENTUCKY MEDICAL ASSOCIATION;
STUART G. YEOMAN, M.D.; President, Warren
County Medical Society;
JOSEPH JANES - - - - - - - - - - *Appellees*

On Transfer From Court of Appeals
No. 93-CA-2840
(Franklin Circuit Court No. 93-CI-959)

OPINION BY JUSTICE WINTERSHEIMER CONCURRING IN PART AND DISSENTING IN PART

I concur with the parts of the Majority Opinion which apparently endorse the legislative philosophy of dedication of tax funds to a particular perceived need. I also concur with the concept of deference to the General Assembly in matters of taxation in general. I further concur with the analysis of the Fourteenth Amendment and Sections 1, 2 and 3 of the Kentucky Constitution. However, I must respectfully dissent from those aspects of the Opinion which

deal with the application of constitutional principles to the specific facts of this case in regard to the subclassification of physicians.

As I noted in my concurring opinion in *Gillis* v. *Yount*, Ky., 748 S.W.2d 357 (1988), the question becomes whether it was arbitrary and unreasonable for the legislature to create a separate subclassification in this case. The problem centers on the classification of those 60 percent of the physicians who participate in Medicaid as contrasted with those 40 percent of physicians who do not participate in the program in any way. One of the greatest dangers to thoughtful analysis in any case involving taxation and the relationship between the judiciary and the legislature or executive is a generalization. Each case must be carefully examined on its own merit.

Here the principal problem relates to a benefit/burden test which produces an arbitrary tax on those 40 percent of the physicians who do not participate in the program. Such a situation is more than unfair or unequal—it is arbitrary. It is understood that this analysis already accepts the segregation of physicians from general taxpayers into a class of their own. Classification by the legislature should be affirmed except as here where there is no rational basis and the legislation is arbitrary. *Delta Air Lines, Inc.* v. *Commonwealth, Revenue Cabinet*, Ky., 689 S.W.2d 14 (1985).

Any extension of the benefits/burdens test can lead to further assignment of tax revenue from all contractors, engineers and architects who could possibly benefit from providing construction work on the state's highways. The same limited application of taxation and the revenues produced thereby could be applied to lawyers for the benefit of the justice system. The list of potential classifications is endless. The problem with disparate treatment of members of a subclass is that it singles out those who do not participate in a particular program as having derived a benefit therefrom. It is impossible to distinguish the benefit the nonparticipating physicians have in funding Medicaid from that of the general population.

The classification is invalid as it applies to 40 percent of the physicians who do not participate in Medicaid. *Cf. Board of Education of Jefferson Co.* v. *Board of Education of Louisville,* Ky., 472 S.W.2d 496 (1971).

In this legislation, the classification created is both too narrow and too broad. It is to narrow because it does not include as taxpayers other people who receive payment for services to Medicaid patients such as chiropractors, dentists, nurses, mid-wives and transportation providers. It has always been the law that it is essential to the constitutionality of taxation that it apply equally to all persons in a given class. A tax which discriminates between different members of a class or subclass should be considered void. *Denton* v. *Porter,* 284 Ky. 114, 143 S.W.2d 1056 (1940).

The legislation does not apply equally to all who are nonphysicians who have been included in the class. There is a difference in tax rates because physicians are taxed at 2 percent of gross; hospitals are taxed at 2½ percent of gross; and pharmacies are taxed at 25 cents per prescription. In addition, physicians who prescribe medicine are prohibited from passing on the tax to their patients while pharmacies are allowed to pass on their provider tax to third payers. Kentucky has long prohibited disparate treatment of persons selling medicine as a violation of the Kentucky Constitution Section 59. *Commonwealth* v. *Payne Medicine Co.,* 138 Ky. 164, 127 S.W. 760 (1910).

Taxing only certain healthcare providers to fund Medicaid is as flawed as would be a system which would tax only school teachers to pay for new educational facilities or taxing only licensed psychologists to pay for public mental health care facilities, or taxing only policemen to pay for victim compensation programs. *Cf. Coy* v. *Florida Birth-Related Neurological Injury Compensation Plan,* Fla., 595 So.2d 943, Kogan J. dissenting, *cert. denied, McGibony* v. *Florida Birth-Related Neurological Injury Compensation Plan,* __ U.S., __, 113 S.Ct. 194, 121 L.Ed.2d 137 (1992). An extension of this idea would perhaps include a tax on grocery store operators on gross receipts to maintain a food stamp program.

The class is too broad because not every physician receives payment from Medicaid. In order for a classification to be constitutional, it must be framed as to be exclusively applicable to the person or things sought to be embraced therein. *Priest* v. *State Tax Commission,* 258 Ky. 391, 80 S.W.2d 43 (1935). It is clearly a gratuitous oversimplification of the law to announce that all physicians somehow benefit from Medicaid payments. If legislation is so broad in its scope as to embrace objects not naturally belonging therein, it does not pass the test under Section 59 of the Kentucky Constitution. *Safety Building & Loan Co.* v. *Ecklar,* 106 Ky. 115, 50 S.W. 50 (1899). A more constitutionally valid system might tax physicians who receive payments for services to Medicaid patients.

Physicians are not the direct or intended beneficiaries of Medicaid programs, the indigent patients are. Participating physicians and other healthcare providers are compensated for their services rendered and therefore receive indirect benefits. A number of shortcomings brings the constitutionality of the legislation into question. The problems include the question of equal protection and arbitrary legislation, the issue of the title not indicating that the bill involves a tax but rather revenue and finance, and veto arguments. The Majority Opinion has properly decided these issues.

The Franklin Circuit Court reasoned correctly that the imposition of a tax on certain physicians was a violation of Section 59 of the Kentucky Constitution which prohibits special legislation. The tax was not limited to the 60 percent of the physicians who participated in the Medicaid program and by assumption benefited thereby, but applied to all physicians rendering health care services in the State. I believe it was incorrectly assumed that an increase in funding was an indirect benefit to those doctors who did not participate.

Although we can only decide the case before us, I do not believe this Court should ignore the fact that there are a number of other cases involving state taxation. The

public press reports that the Revenue Cabinet is now involved in 11 major lawsuits. It is not difficult to understand why the taxpayers are very concerned in a society in which ordinary working people will pay in excess of 40 percent of their gross income in taxation. As noted by the Majority Opinion, the question of taxation is a peculiarly legislative function of government. The only role of the court is to review a specific tax on the grounds of arbitrariness or improper classification. Each case must be reviewed on a case-by-case approach.

This Court decided *Commonwealth of Kentucky, Revenue Cabinet* v. *Cope* on January 31, 1994, to the effect that a legislative grant of exemption was a legitimate classification between private and government pension plans. There is a difference between the imposition of taxes and the grant of an exemption from taxes. It was possibly a shortcoming that the *Cope, supra,* decision did not make it clear that the legislature could exempt all pensions, both private and governmental as one of the options to which the court deferred. The legislature still has that option.

"The power to tax involves the power to destroy" noted Chief Justice John Marshall in *McCulloch* v. *Maryland,* 17 U.S. 159 (4 Wheat. 316), 4 L.Ed. 579 (1819). The duty of the judiciary is to distinguish between constitutional error and proper deference to the legislature. Unequal treatment really should not be acceptable although it is seemingly approved by the Majority Opinion.

There may be many different views as to how to apply the same standards. The responsibility for fashioning fair tax laws is that of the General Assembly. It cannot be delegated and it cannot be assumed by any other branch of government.

Stumbo, J., joins in this opinion.

SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY, Et Al. - - *Appellants*

v.

CHARLES C. SMITH, JR., M.D., Et Al. - - - *Appellees*

On Review From the Court of Appeals
93-CA-2840-TI
(Franklin Circuit Court No. 93-CI-0959)

ORDER DENYING PETITION FOR REHEARING

AND

ORDER DENYING MOTION FOR ORAL ARGUMENT

Appellees petition for rehearing and appellees motion for oral argument in the above-styled appeal are denied.

Stephens, C. J., and Reynolds and Wintersheimer, JJ., concur. Special Justices Stephen C. Cawood, Ben S. Fletcher III and R. Kent Westberry concur.

ENTERED: June 23, 1994.

/s/ Robert F. Stephens
Chief Justice

Supreme Court, U.S.
FILED
OCT 20 1994
OFFICE OF THE CLERK

No. 94-504

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

STUART G. YEOMAN, M.D., et al. - - Petitioners
versus
COMMONWEALTH OF KENTUCKY
REVENUE CABINET, et al. - - - Respondents

AND

No. 94-525

CHARLES C. SMITH, JR., M.D., et al. - Petitioners
versus
COMMONWEALTH OF KENTUCKY
REVENUE CABINET, et al. - - - Respondents

On Petitions for a Writ of Certiorari
to the Supreme Court of Kentucky

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether three sitting special supreme court justices appointed by the governor in accordance with Section 110(3) of the Kentucky Constitution should have disqualified themselves when there was no allegation or evidence in the record of impropriety, bias or prejudice on the part of any of those special justices.

2. Whether a state health care provider tax imposed on physicians violates the prohibition against special legislation contained in Section 59 of the Kentucky Constitution.

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No. 94-504

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

STUART G. YEOMAN, M.D., et al. - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY, REVENUE CABINET, et al. - - - - - - - - *Respondents*

AND

No. 94-525

CHARLES C. SMITH JR., M.D., et al. - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY, REVENUE CABINET, et al. - - - - - - - - *Respondents*

On Petitions for a Writ of Certiorari to the Supreme Court of Kentucky

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents accept the statement of the case as set forth by the Petitioners, except as clarified or modified herein.

The health care provider tax statute in question was challenged in the trial court as violating the Petitioners'

rights under the Fifth and Fourteenth Amendments to the U.S. Constitution, and Sections 2, 3, and 59 of the Kentucky Constitution, but both the trial court and the Supreme Court of Kentucky's rulings rested on Section 59 of the Kentucky Constitution. *Commonwealth* v. *Smith*, Ky., 875 S.W.2d 873 (1994); *Yeoman* Pet. 31a-49a. The Petitioners sued the Revenue Cabinet and its Secretary, the Cabinet for Human Resources and its Secretary, and the Kentucky Health Care Data Commission. The Governor of Kentucky, Brereton C. Jones, was not a party-defendant, and is not a respondent herein.

The tax was contained in House Bill 1 (HB 1) enacted by the Kentucky General Assembly in its Second Extraordinary Session of 1993 to provide partial funding for Medicaid, the state/federal indigent health care program in which Kentucky voluntarily participates. HB 1 was repealed effective July 14, 1994 and replaced with another health care provider tax, House Bill 250, which differs from HB 1 in several regards. In addition to imposing a tax on physician services, HB 1 imposed a tax on hospital services, nursing facility services, intermediate care facility services for the mentally retarded, home health care services, services of health maintenance organizations, and outpatient prescription drugs. The method of taxation chosen here was but one of several federally permissible health care tax options available to the states. *See* 42 C.F.R. 433.55. The legislature amended HB 1 numerous times before its enactment, and the bill contained significant health care legislation in addition to the provider tax. Contrary to Petitioners' statements, HB 1 was not the "governor's bill." The governor's proposal was contained in House Bill 3 which was considered that session but not adopted.

The trial court held that the challenged statutes were unconstitutional as special legislation under Section 59 of the Kentucky Constitution. Respondents appealed to the Kentucky Court of Appeals and the case was transferred

to the Supreme Court of Kentucky. In reversing the trial court, the Supreme Court of Kentucky rested its decision on state constitutional law. In applying Kentucky Constitution Section 59 to the provider tax statute, the court held that the statute was not special legislation, relying upon *Tabler* v. *Wallace*, Ky., 704 S.W.2d 179 (1985), *cert. denied*, 479 U.S. 822 (1986), *Federal Communications Commission* v. *Beach Communications, Inc.*, ___ U.S. ___, 113 S.Ct. 2096 (1993), *Waggoner* v. *Waggoner*, Ky., 846 S.W.2d 704, *cert. denied*, ___ U.S. ___, 114 S.Ct. 346 (1993), *Reynolds Metal Co.* v. *Martin*, 269 Ky. 378, 107 S.W.2d 251 (1937), *Gillis* v. *Yount*, Ky., 748 S.W.2d 357 (1988), and other state law decisions.

In addressing Petitioners' allegations regarding the three special justices appointed by Governor Jones, the opinion relied upon interpretation of the method of appointment adopted in the Kentucky Constitution. The Supreme Court of Kentucky relied on Section 110 of the Kentucky Constitution and the cases interpreting it, particularly *Ex parte Auditor of Public Accounts*, Ky., 609 S.W.2d 682 (1980), and held that recusal is a personal matter to be decided by each individual justice in the absence of any so-called *per se* disqualification or statutory prohibition. The special justices made such personal review. *See Orders, Yeoman* Pet. 26a-28a. In addition, the court pointed out that the Petitioners' affidavit to the court at no point made any allegations of impropriety, bias or prejudice against the three sitting special justices. *Affidavit of Stuart G. Yeoman, M.D.*, App. 5a-19a. The Petitioners failed to address the issue when offered the chance at oral argument. A unanimous court denied the Petitioners' motions for recusal, determining that the governor properly appointed the special justices in accordance with the Kentucky Constitution.

REASONS FOR DENYING THE WRIT

In finding that the tax imposed on physicians under House Bill 1 does not violate the Kentucky Constitution, the Supreme Court of Kentucky fully considered and correctly applied the relevant sections of the Kentucky Constitution and state cases construing those sections. The court also held that the Petitioners' allegations that the governor's interest in state health care reform and his active participation in the political process did not require recusal of the three sitting special justices appointed by the governor where there was no evidence in the record showing impropriety, bias or prejudice of any of those special justices.

I. THE SUPREME COURT OF KENTUCKY WAS PROPERLY CONSTITUTED WHEN IT INCLUDED SPECIAL JUSTICES APPOINTED BY THE GOVERNOR PURSUANT TO KENTUCKY CONSTITUTION SECTION 110(3).

No special or important issue justifying the grant of certiorari was raised when the Supreme Court of Kentucky held that the Governor followed proper Kentucky constitutional procedure in appointing special justices to the Supreme Court of Kentucky.

A. The Governor Is Required by Kentucky Constitution Section 110(3) to Appoint Special Justices upon the Recusal of Two or More Justices.

Kentucky Constitution § 110(3) provides:

> (3) A majority of the justices of the Supreme Court shall constitute a quorum for the transaction of business. If as many as two justices decline or are unable to sit in the trial of any cause, the Chief Justice shall certify that fact to the Governor, who shall appoint to try the particular cause a sufficient number of justices to constitute a full court for the trial of the cause.

App. 4a.

Three justices of the Supreme Court of Kentucky recused themselves from hearing this case. The lead plaintiff below, Dr. Charles C. Smith, Jr., was the personal physician of Justice Charles M. Leibson. *Order, Yeoman* Pet. 20a-21a. Justice Thomas B. Spain was a member of the Board of Directors and Executive Committee of Trover Clinic Foundation, Inc. Justice Joseph E. Lambert was a member of the Governing Board of the Rockcastle Hospital and Respiratory Care Center, Inc. *Notices of Recusal, Yeoman* Pet. 17a-19a.

After the Chief Justice certified the recusal of the three justices to the governor, Governor Jones appointed three special justices who met the qualifications for a supreme court justice set forth in KRS 21A.120. Those appointments were mandated by Section 110(3) of the Kentucky Constitution. The Kentucky Constitution provides no alternate method of filling vacancies on the court. Indeed, failure to appoint would have been a dereliction of the governor's constitutional duties.

The governor fills vacancies at all levels of the state court system, just as the President of the United States fills vacancies in the federal court system. U.S. Const. art. II, § 2; 28 U.S.C. §§ 44, 133, 171, 251; Ky. Const. § 118. The executive branch's power and duty to make judicial appointments is rooted in the American system of government.

> The constitutional check-and-balance relationship between the executive and judicial branches of the government consists of the provisions for filling vacancies in judicial offices and for the appointment of temporary substitutes when two or more justices of the Supreme Court decline or are unable to participate in the disposition of a cause pending before that court. Const. Secs. 118, 110(3). Those relationships between the legislature and judicial branches exist by virtue of Const. Secs. 110(4), 111(1), 112(2) and (3) and 113(2) and (3), pertaining to judicial districts and number of judges and justices.

Ex parte Auditor of Public Accounts, 609 S.W.2d at 685.

Petitioners do not challenge the constitutionality of Section 110(3), only its application in this case. *Smith* Pet., p. 17. Respondents are in total agreement with the *Smith* Petitioners that "if the Kentucky Constitutional directives in Section 110 and 123 are disregarded, the due process rights of persons subject to the tribunal are violated." *Smith* Pet., p. 14. Thus, as the Petitioners admit, if the governor had not acted in accordance with Section 110(3), their constitutional rights would have been violated.

The Supreme Court of Kentucky unanimously held that the governor acted in accordance with Kentucky Constitution Section 110(3). The disposition of this issue rested wholly on Section 110 and the Kentucky cases interpreting that section. *Commonwealth* v. *Smith*, Ky., 875 S.W.2d 873, 878-879 (1994); *Yeoman* Pet. 31a-49a.

B. Recusal of the Sitting Special Justices Would Have Been Inappropriate Because There Were No Allegations or Evidence in the Record Showing Impropriety, Bias or Prejudice on the Part of Any of Those Justices.

The *Yeoman* Petitioners' affidavit, submitted to the Supreme Court of Kentucky, contained no allegations that any of the three justices who participated in the decision were biased or that they had any pecuniary or other interest in this matter. Instead, the motion for recusal and supporting affidavit consisted of a litany of times and places in which Governor Jones announced his interest in health care reform. In view of the nationwide interest in such reform, this hardly makes the governor unique. The Petitioners' case is based solely upon the premise that because the Governor of Kentucky has publicly stated his position and the goals of his administration regarding the issue of health care he is unable to fulfill his constitutional duty to appoint special justices in this case. If the Petitioners'

argument is followed to its logical conclusion, no United States Supreme Court Justice would be permitted to hear any case involving an issue on which the President appointing such justice has expressed a public opinion.

Although the Petitioners devote several pages recounting the actions and public statements of the governor, the governor is not a party to this action. The key issue is whether the special justices appointed by the governor had any bias or prejudice or otherwise acted improperly thereby disqualifying them from sitting. In *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), this Court held that for recusal to be constitutionally mandated, there must be more than mere allegations of a justice's interest in a case. The *Aetna* Court noted that "accepting appellant's expansive contentions might require the disqualification of every judge in the state."[1] *Id.* at 825. Additionally, when the Petitioners raised specific objections to the appointment of one of the proposed special justices, that person declined the appointment.

In declining to recuse themselves from hearing this matter, each of the special justices followed the procedures for personal review required by KRS 26A.015 and SCR 4.300. These procedures are consistent with those followed in the federal court system which set forth an objective reasonable person standard. 28 U.S.C. § 455(a). *See Yeoman* Pet. 26a-28a. "[A] judge should be disqualified only if it appears that he or she harbors an aversion, hostility, or disposition of a kind that a fair minded person could not

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[1]Contrary to the *Smith* Petitioners' proposed remedy, the Court in *Lavoie* specifically provided the proper remedy when a disqualified justice participates in a decision. The Court held that the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings. 475 U.S. at 837. *Smith* Pet., p. 15.

put aside when judging the dispute." *Liteky* v. *U.S.*, ___ U.S.___, 114 S.Ct. 1147, 1158 (1994) (Kennedy, J. concurring). The Supreme Court of Kentucky and the individual sitting justices fully considered the issues raised by their appointment and participation in this case and correctly held that such actions were constitutional on state law grounds and in full compliance with the judicial canons of ethics.

C. A Practicing Attorney May Sit as a Special Justice under Established Kentucky Case Law.

Contrary to the *Smith* Petitioners' argument, although Kentucky Constitution Section 123 prohibits a judge or justice from practicing law "[d]uring his term of office," that section does not apply to special justices. A special justice does not serve a "term of office" since he is not elected for a specific term and acts on a *pro tempore* basis. *Regency Pheasant Run Ltd.* v. *Karem*, Ky., 860 S.W.2d 755, 757 (1993). Further, Kentucky Constitution Section 110(5)(b) prohibits the appointment of an active judge to sit as a special justice on the Supreme Court of Kentucky. *See Kentucky Utilities* v. *South East Coal Company*, Ky., 836 S.W.2d 407, 409, *pet. cert. voluntarily dismissed pursuant to Rule 46*, ___ U.S. ___, 113 S.Ct. 1147 (1992).

D. The Petitioners' Alternate Methods for Choosing Special Justices Have No Constitutional or Statutory Merit.

The Petitioners suggest that the Chief Justice or the Kentucky Bar Association could have appointed the special justices in this case. However, the Chief Justice is prohibited from appointing special justices when three sitting justices recuse themselves. Ky. Const. § 110(3); *Kentucky Utilities* v. *South East Coal Company*, 836 S.W.2d 407. Since the Chief Justice voted with the majority, Petitioners would no doubt complain that the Chief Justice would have been inclined to choose individuals who shared

his beliefs, particularly since the Chief Justice had previously ruled that the Commonwealth had a "strong possibility of success on appeal." *December 21, 1993 Order of the Supreme Court of Kentucky Granting Intermediate Relief Pursuant to CR 76.33*, App. 21a.

The suggestion of an appointment by the Kentucky Bar Association also has no merit, legally or practically. No constitutional or statutory provision even alludes to such a method of appointment. A bar association appointment would place the selection of a special justice in the hands of an individual or group unaccountable to the electorate. Therefore, neither of Petitioners' suggested alternatives have constitutional or statutory merit.

II. THE STATE COURT DECISION SHOULD NOT BE REVIEWED BECAUSE IT IS BASED ON ADEQUATE AND INDEPENDENT NONFEDERAL GROUNDS.

This Court should deny the petitions for writ of certiorari because the decision of the Supreme Court of Kentucky, *Commonwealth* v. *Smith*, 875 S.W.2d 873; *Yeoman* Pet. 31a-42a, rests on the independent and adequate nonfederal grounds of the Kentucky Constitution Section 59 and the state cases construing that section. "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan* v. *Long*, 463 U.S. 1032, 1040 (1983). The grounds for the decision of the Supreme Court of Kentucky are independent because of the unique constitutional provision involved, and adequate because they are broad enough to dispose of this entire issue. *Enterprise Irrig. District* v. *Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917).

A. The Language and Application of the Special Legislation Prohibition Found in Section 59 are Unique to Kentucky.

Section 59 of the Kentucky Constitution prohibits "special legislation" in the area of taxation and twenty-seven other enumerated areas. Section 59 also provides that "[i]n all other cases where a general law can be made applicable, no special law shall be enacted." Ky. Const. § 59(29), App. 3a. The underlying purpose of Section 59 is to protect citizens without means from lobbyists who influence legislation. *Kentucky Harlan Coal Co.* v. *Holmes*, Ky., 872 S.W.2d 446 (1994).

The Petitioners concede that Section 59 "has long been interpreted as providing greater protection for individual liberty and against arbitrary exercises of legislative power than the United States Constitution and other state constitutions," *Yeoman* Pet., p. 15 n. 2. "When considered against its historical background, it is evident that Section 59 is more than simply another way of restating the generalized language of the equal protection clause of the Fourteenth Amendment to the United States Constitution." *Tabler* v. *Wallace*, 704 S.W.2d 179, 183, *cert. denied*, 479 U.S. 822 (1986). See also *Smith*, 875 S.W.2d at 878; *Yeoman* Pet. 38a. In light of the Court's policy of avoiding adjudication of unnecessary constitutional questions, this Court should not review the Supreme Court of Kentucky's decision. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982); *Kentucky* v. *Stincer*, 482 U.S. 730 (1987).

Section 59 is complex because each factual situation must be judged separately against the state constitutional standard that has evolved in interpreting that section. The *Yeoman* Petitioners cite *Tabler* v. *Wallace*, 704 S.W.2d 179, *Perkins* v. *Northeastern Log Homes*, Ky., 808 S.W.2d 809 (1991), and *Commonwealth* v. *Wasson*, Ky., 842 S.W.2d 487 (1992), for the proposition that Section 59 is consistently invoked to void arbitrary legislation. *Yeoman* Pet.,

p.15 n.2. While the Supreme Court of Kentucky voided the statutes in those cases, many other statutes are held valid under Section 59. In *Waggoner* v. *Waggoner*, 864 S.W.2d 704, the Supreme Court of Kentucky upheld a statutory classification exempting teachers' retirement contributions from consideration as marital property in a divorce proceeding while other pensions were subject to division. Also, in *Sims* v. *Board of Education of Jefferson County*, Ky., 290 S.W.2d 491 (1956), Kentucky's highest court upheld an occupational license tax on the earnings of individuals and profits of businesses to benefit public schools even though the taxpayer had no children in school and received no direct personal benefit. The *Smith* decision is consistent with other recent holdings by the Kentucky appellate courts. *Kentucky Harlan Coal Co.* v. *Holmes*, 872 S.W.2d 446; *Edwards* v. *Land*, Ky. App., 851 S.W.2d 484 (1992). Therefore, no departure from established Kentucky law exists in the instant case. *Cf. Aetna* v. *Lavoie*, 475 U.S. 813.

The Kentucky courts review and weigh each Section 59 case individually. After full consideration of the facts of this case, the Supreme Court of Kentucky rested its decision on Section 59, an independent and adequate nonfederal ground. *Smith*, 875 S.W.2d at 875; *Yeoman* Pet. 31a-32a. Therefore, this Court should deny certiorari.

B. The Kentucky Supreme Court Decision Was Not Based on a Federal Question and Is Not in Conflict with Any Other Federal or State Court Decisions.

While the Supreme Court of Kentucky referred to general constitutional principles in deciding these issues, the court did not construe or directly apply the U.S. Constitution in its decision. Nor did the court decide any matter at issue directly relating to the validity, construction, application or administration of any federal statute, or any right, title, privilege or immunity under any federal statute.

Moreover, the Supreme Court of Kentucky did not decide a federal question in direct conflict with any applicable decision of this Court, the U.S. Court of Appeals, or a state court of last resort. Indeed, the Petitioners fail to identify any such cases. In the only analogous case, the Florida Supreme Court upheld a tax on all physicians licensed to practice medicine in Florida to fund the Birth-Related Neurological Injury Compensation Fund that compensates victims for birth-related neurological injuries. *Coy* v. *Florida Birth-Related Injury Compensation Plan*, Fla., 595 So.2d 943, *cert. denied, sub nom, McGibony* v. *Florida Birth-Related Neurological Injury Compensation Plan*, ___ U.S.___ , 113 S.Ct. 194 (1992). Although not all physicians subject to the tax would benefit from potentially lower malpractice premiums, the *Coy* court found that the tax was sufficiently related to the delivery of health care in general.

The Kentucky Supreme Court's decision in *Smith* referred to "federal criteria" imposed on the states to be eligible to obtain federal matching funds under the Medicaid program. *Smith*, 875 S.W.2d at 875-876; *Yeoman* Pet. 34a. However, those references are simply a recognition by the court of the factual background against which the Kentucky General Assembly enacted the tax provisions in HB 1, and not, as Petitioner *Smith* contends, the court's "misconstru[ction]" and "misapplication" of federal law. *Smith* Pet., pp. 22-25. The determination of whether the provider tax revenues are eligible for match will be made by the federal Health Care Financing Administration. This issue is not before the Court.

The Supreme Court of Kentucky properly recognized that it would have been "illogical" for the legislature not to have "designed" HB 1 "to meet" those federal "requirements as to the class of health care providers that may be taxed in order to qualify for matching funds." *Smith*, 875

S.W.2d at 876; *Yeoman* Pet. 34a. The Kentucky General Assembly, facing a July 1, 1993 deadline for changing Kentucky's existing provider tax, met in special session to find a way to provide money needed to match federal Medicaid dollars. *See* 42 U.S.C. § 1396b(w). Contrary to Petitioner *Smith's* characterization, the Supreme Court of Kentucky did not determine that the federal criteria "compelled" or "mandate[d]" the tax provisions at issue. *Smith* Pet., pp. 24-25. Rather, the court correctly found that the federal criteria were operative facts in the enactment of HB 1, and that "defining the class [of those to be taxed under HB 1] in a coextensive manner with the federal law results in a rational basis for such classification without arbitrariness." *Smith*, 875 S.W.2d at 876; *Yeoman* Pet. 34a.

Federal and state courts have consistently held that legislative bodies possess greater freedom in classifications in the field of taxation than in other areas. *Madden* v. *Kentucky*, 309 U.S. 83 (1940); *Delta Air Lines, Inc.* v. *Revenue Cabinet*, Ky., 689 S.W.2d 14 (1985).

Since the Supreme Court of Kentucky correctly decided the particular issues in this case using state law principles which are not in conflict with federal law or decisions, there is no basis or need for review of those state law issues on a writ of certiorari.

CONCLUSION

Because the Supreme Court of Kentucky did not decide a federal question nor specifically rule on the constitutionality of a state statute under the federal constitution, but declared a tax statute enacted by the Kentucky General Assembly and the appointment of three special justices to be constitutionally sound, no special and important reasons exist for the Court to review this matter.

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

[EXCERPTS FROM KENTUCKY CONSTITUTION]

§ 59. Local and special legislation. — The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely:

First: To regulate the jurisdiction, or practice, or the circuits of the courts of justice, or the rights, powers, duties or compensation of the officers thereof; but the practice in circuit courts in continuous session may, by a general law, be made different from the practice of circuit courts held in terms.

Second: To regulate the summoning, impaneling or compensation of grand or petit jurors.

Third: To provide for changes of venue in civil or criminal causes.

Fourth: To regulate the punishment of crimes and misdemeanors, or to remit fines, penalties or forfeitures.

Fifth: To regulate the limitation of civil or criminal causes.

Sixth: To affect the estate of cestuis que trust, decedents, infants or other persons under disabilities, or to authorize any such persons to sell, lease, encumber or dispose of their property.

Seventh: To declare any person of age, or to relieve an infant or feme covert of disability, or to enable him to do acts allowed only to adults not under disabilities.

Eighth: To change the law of descent, distribution or succession.

Ninth: To authorize the adoption or legitimation of children.

Tenth: To grant divorces.

Eleventh: To change the names of persons.

Twelfth: To give effect to invalid deeds, wills or other instruments.

Thirteenth: To legalize, except as against the Commonwealth, the unauthorized or invalid act of any officer or public agent of the Commonwealth, or of any city, county or municipality thereof.

Fourteenth: To refund money legally paid into the State Treasury.

Fifteenth: To authorize or to regulate the levy, the assessment or the collection of taxes, or to give any indulgence or discharge to any assessor or collector of taxes, or to his sureties.

Sixteenth: To authorize the opening, altering, maintaining or vacating of roads, highways, streets, alleys, town plats, cemeteries, graveyards, or public grounds not owned by the Commonwealth.

Seventeenth: To grant a charter to any corporation, or to amend the charter of any existing corporation; to license companies or persons to own or operate ferries, bridges, roads or turnpikes; to declare streams navigable, or to authorize the construction of booms or dams therein, or to remove obstructions therefrom; to affect toll gates or to regulate tolls; to regulate fencing or the running at large of stock.

Eighteenth: To create, increase or decrease fees, percentages or allowances to public officers, or to extend the time for the collection thereof, or to authorize officers to appoint deputies.

Nineteenth: To give any person or corporation the right to lay a railroad track or tramway, or to amend existing charters for such purposes.

Twentieth: To provide for conducting elections, or for designating the places of voting, or changing the boundaries of wards, precincts or districts, except when new counties may be created.

Twenty-first: To regulate the rate of interest.

Twenty-second: To authorize the creation, extension, enforcement, impairment or release of liens.

Twenty-third: To provide for the protection of game and fish.

Twenty-fourth: To regulate labor, trade, mining or manufacturing.

Twenty-fifth: To provide for the management of common schools.

Twenty-sixth: To locate or change a county seat.

Twenty-seventh: To provide a means of taking the sense of the people of any city, town, district, precinct or county, whether they wish to authorize, regulate or prohibit therein the sale of vinous, spirituous or malt liquors, or alter the liquor laws.

Twenty-eighth: Restoring to citizenship persons convicted of infamous crimes.

Twenty-ninth: In all other cases where a general law can be made applicable, no special law shall be enacted.

§ 110. Composition — Jurisdiction — Quorum — Special justices — Districts — Chief justice. — (1) The Supreme Court shall consist of the chief justice of the commonwealth and six associate justices.

(2)(a) The Supreme Court shall have appellate jurisdiction only, except it shall have the power to issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause, or as may be required to exercise control of the Court of Justice.

(b) Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules.

(3) A majority of the justices of the Supreme Court shall constitute a quorum for the transaction of business. If as many as two justices decline or are unable to sit in the trial of any cause, the chief justice shall certify that fact to the governor, who shall appoint to try the particu-

lar cause a sufficient number of justices to constitute a full court for the trial of the cause.

(4) The Court of Appeals districts existing on the effective date of this amendment to the constitution shall constitute the initial Supreme Court districts. The general assembly thereafter may redistrict the commonwealth, by counties, into seven Supreme Court districts as nearly equal in population and as compact in form as possible. There shall be one justice from each Supreme Court district.

(5)(a) The justices of the Supreme Court shall elect one of their number to serve as chief justice for a term of four years.

(b) The chief justice of the commonwealth shall be the executive head of the Court of Justice and he shall appoint such administrative assistants as he deems necessary. He shall assign temporarily any justice or judge of the commonwealth, active or retired, to sit in any court other than the Supreme Court when he deems such assignment necessary for the prompt disposition of causes. The chief justice shall submit the budget for the Court of Justice and perform all other necessary administrative functions relating to the court.

COMMONWEALTH OF KENTUCKY

SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY,
REVENUE CABINET, ET AL., - - - - APPELLANTS

v.

CHARLES C. SMITH, JR., M.D., ET AL., - - - APPELLEES

AFFIDAVIT OF STUART G. YEOMAN, M.D.

NOW COMES the Affiant, STUART G. YEOMAN, M.D., and, after being duly sworn, deposes and says:

1. That this Affiant is a physician who practices medicine in Bowling Green, Kentucky, and is one of the Appellees/Movants in the above-entitled case.

2. That this Affiant obtained from the *Louisville Courier-Journal* nearly six hundred (600) news articles in which Governor Brereton C. Jones, both before and during his administration, has commented upon the need for health care reform in Kentucky.

3. That of the aforesaid articles this Affiant obtained, the following are representative of the involvement of Governor Brereton C. Jones in the development and drafting of what became House Bill 1; and, of the fact that he called the Kentucky General Assembly into Extraordinary Session to consider the Bill; that he publicly lobbied for its passage and signed the Bill into law; and that he has publicly commented on the within-styled case:

A. From the start of his political career, Governor Jones has made health care reform one of his highest political priorities. He has repeatedly stated that essential to reform is universal health insurance coverage for all Ken-

tuckians. As early as May, 1989, while he was Lt. Governor and the head of the Kentucky Health Care Access Foundation, Governor Jones endorsed a plan to "expand the Medicaid program to cover all uninsured Kentuckians with incomes less than the federal poverty line." At that time, Medicaid covered only about half of those for whom he sought coverage. He has acknowledged that such an expansion of Medicaid would "cost the State at least $210 million, and is 'totally impractical' in the current financial condition." *Courier-Journal,* May 10, 1989. Exhibit 1.

B. During his campaign for Governor, Jones made health care reform one of his highest priorities. He stated, "we're going to insist on reform, so that we can improve the quality of health care, hold down costs and expand coverage." *Courier-Journal,* October 2, 1991. Exhibit 2.

C. As Governor-Elect, Jones, in November, 1991, stated that proposed changes in Medicaid rules could sidetrack his proposal to expand Medicaid coverage to approximately 225,000 so-called uninsured Kentuckians. Jones said that, if Medicaid changes go through, his proposal is not going to be practical or realistic. *Courier-Journal,* November 8, 1991. Exhibit 3.

D. In his inaugural address, Governor Jones stated, "cooperation and mutual respect will give us a fighting chance to take a national leadership role in providing quality health care for all people." *Courier-Journal,* December 11, 1991. Exhibit 4.

E. In his first State of the State speech (delivered before the Kentucky General Assembly), Governor Jones said, "I cannot and I will not allow a temporary budget problem to deter us from achieving our goals of affordable health care to every Kentuckian." He further stated, "I will appoint a special task force for comprehensive health care reform. This task force will be charged with developing reform recommendations this year because this issue requires action as soon as possible. I will then ask you to consider those recommendations in a special legislative session." *Courier-Journal,* January 14, 1992. Exhibit 5.

F. From the start of his tenure as Governor, Jones has pushed for legislation mandating universal health insurance for all Kentuckians. In February 1992, Representative Joe Clarke said, "That whole special session (on health care reform) concerns me because the Governor has raised expectations that we'll find a solution. But right now I can't think of any comprehensive solution that doesn't call for either reduced benefits or cost a lot more money." *Courier-Journal,* February 8, 1992. Exhibit 6.

G. In March 1992, Governor Jones formed the Commission on Health Care Reform, chaired by Leonard Heller, and the Task Force on Health Care Access and Affordability, chaired by James Newberry. Jones said, "This announcement begins a process that will bring meaningful health care reform to Kentucky." *Courier-Journal,* March 12, 1992 (7). On March 26, 1992, Governor Jones imposed a moratorium on the expansion of health care facilities and services to "clear the decks" for the groups he appointed to come up with health care reform ideas. *Courier-Journal,* March 27, 1992 (8). On April 9, 1992, Governor Jones stated *he planned to call a special legislative session on health care in November of 1992. Courier-Journal,* April 10, 1992 (9). On April 25, 1992, Governor Jones, in a speech in Eastern Kentucky, said, "We are going to take the national leadership role in providing health care." *Courier-Journal,* April 26, 1992. (10) Exhibits 7, 8. *[sic]* 9 and 10.

H. In June 1992, Leonard Heller, Governor Jones' Human Resources Secretary, again stated that Medicaid coverage could be expanded to cover more people, since the program now covers only about half of the people living under the federal poverty line. *Courier-Journal,* June 13, 1992. Exhibit 11.

I. On July 8, 1992, "Governor Jones told a group of legislative leaders that he is fully committed to health care

reform in Kentucky, regardless of how much political capital he must expend, and that any reform measure must address cost containment, malpractice reform and universal coverage." *Courier-Journal,* July 9, 1992. Exhibit 12.

J. On July 10, 1992, at the first meeting of his Commission for Health Care Reform, Governor Jones stated, *"Health Care Reform is this administration's top priority."* He further stated, "The goals of reform would be to provide everyone access to basic, good-quality care and to control costs." *Courier-Journal,* July 11, 1993. Exhibit 13.

K. On July 13, 1992, Governor Jones said that it "is very close to time to go to war to win health care reform in Kentucky." Jones said he *"won't back away from his proposal to treat health care providers like utilities and regulate their rates."* He thinks Kentucky should assert power to set health care rates so as to guard against the unreasonableness of some who are in the profession. In a forum that also featured West Virginia Senator Jay Rockefeller and Pennsylvania Senator Harris Wofford, Jones said he is "very confident the November special session will produce universal coverage and other sweeping reforms in Kentucky." *Courier-Journal,* July 14, 1992 (14). In the same forum, Governor Jones proposed that employers be mandated to provide health insurance to all their workers. *Courier-Journal,* July 15, 1992 (15). Exhibits 14 and 15.

L. On August 9, 1992, Governor Jones stated, in response to an unrelated setback, "this quite frankly, will probably serve as a blessing because it will allow me to take the focus off of things that maybe are not as important as health care reform and put all of our focus on health care." *Courier-Journal,* August 10, 1992. Exhibit 16.

M. In an article in the *Courier-Journal* dated August 19, 1992, it was reported that Governor Jones was still planning on a November Special Session on Health Care, even though he had not yet revealed his own proposals for health care reform to his Commission on Health Care Reform. Key legislators questioned the wisdom of a November Special Session. Joe Clarke said, "I have never thought

shooting for November was wise. I don't see how in the world we can do it now." *Courier-Journal,* August 19, 1992. Exhibit 17.

N. In September 1992, in the plan developed by Governor Jones to his Health Reform Commission, *Governor Jones called for extending the current tax on health care providers used to help fund the Medicaid program to more providers to pay for expanding the Medicaid program.* The plan said the reforms would be financed without a new tax. *But, health care providers and individuals would be expected to pay so the coverage can be provided. Courier-Journal,* September 3, 1992 (18). On September 2, 1992, Governor Jones stated, "I am unwilling to allow any issue to create problems that will stand in the path of our providing health care for every Kentuckian", *[sic]* and that he intends for "health care reform to be the hallmark of his administration". *[sic] Courier-Journal,* September 3, 1992 (19). Exhibits 18 and 19.

O. On September 9, 1992, Governor Jones formally unveiled his health reform plan that called for all Kentuckians to have health insurance by the end of 1993. All employers would have to provide coverage for their employees and the state picking up the cost for the poor. The state Medicaid program would be expanded to fully cover health care for unemployed adults living below the federal poverty level. To pay for the plan, *Governor Jones proposed broadening the existing tax on providers of health services, to obtain additional federal Medicaid money. Courier-Journal,* September 10, 1992. Exhibit 20.

P. On September 18, 1992, Governor Jones, responding to mounting questions about his health care proposals, said, *"I will convene a special session in November regardless of whether the plan is ready or if there are enough votes to pass it." Courier-Journal,* September 19, 1992 (21). In a September 24, 1992 article in the *Courier-Journal,* Governor Jones' problems in gaining support for his health reform plan with legislators was discussed. Representative Kenny Rapier, House Majority Whip, said of

Jones' plan, "There was zero support for it before today, and there's zero today." Both Senator Mike Moloney and Representative Marshall Long questioned financing. *Courier-Journal,* September 24, 1992 (22). On September 24, 1992, Governor Jones backed off his promise to call a special session in November after meeting with Senator John "Eck" Rose and Representative Joe Clarke. Clarke told the Governor he was "losing his capital with legislators" by insisting on the November deadline." *[sic] Courier-Journal,* September 25, 1992 (23). Exhibits 21, 22 and 23.

Q. On November 8, 1992, Governor Jones said in an interview that Kentucky is further along in health reform than the federal government and, "we've got to show the leadership in health care reform". *[sic]* He said *"Kentucky was in a better position to act for the simple reason that this is my No. 1 priority, and I'm willing to spend all of my political capital if necessary to get this done."* *Courier-Journal,* November 9, 1992. Exhibit 24.

R. In response to the Governor, Representative Kenny Rapier stated that small business opposed the mandate for employers to provide insurance coverage for their employees and "knowledgeable House Democrats want to go slow on providing universal health coverage, phasing it in over several years." *Courier-Journal,* November 22, 1992. Exhibit 25.

S. On December 4, 1992, Governor Jones said "he would unveil his revised health care package in the next few days." He said, "the failure to get his health care plan off the ground this year was the *biggest disappointment* of his first year in office." *He further stated he plans to call a special session on health care early in 1993. Courier-Journal,* December 5, 1992. Exhibit 26.

T. On December 8, 1992, Governor Jones said he *"will do whatever it takes to get his health care reform plan passed. When we get this plan together . . . you will see a fight like you've never seen before. You just have to play hardball politics." He said, "this is my No. 1 priority." Courier-Journal,* December 9, 1992. Exhibit 27.

U. On December 9, 1992, *Governor Jones said his revised plan would be financed through cost saving measures and expanding tax on providers. Courier-Journal,* December 10, 1992. Exhibit 28.

V. After Governor Jones presented his revised plan and further modifications, there were still major problems with the Legislature. Speaker Joe Clarke said, "There's no way to pass it, at least not this year. I probably mean next year, too. The problem is in the Governor's insistence on universal access." *Courier-Journal,* March 7, 1993. Exhibit 29.

W. On March 10, 1993, a "health care advisor to the Governor acknowledged that opposition to Jones's two reform plans may mean he'll have to come up with a third one." However, Governor Jones reiterated that any reform plan must extend coverage to all Kentuckians, not just give them a chance to buy it. *Courier-Journal,* March 11, 1993. Exhibit 30.

X. On March 31, 1993, Governor Jones outlined another proposal for universal health care coverage in Kentucky. This proposal created a payroll tax of 3% or 4% and mandated that individuals buy health insurance. Governor Jones "stuck by his insistence that the state should seek immediate, universal coverage for all of its residents." Democratic representatives said mandates and new taxes would be very hard to pass. *Courier-Journal,* April 1, 1993. Exhibit 31.

Y. On April 21, 1993, the *Courier-Journal* reported that *Governor Jones was meeting with lawmakers, one-on-one, to line up support for his health reform plan and to prepare for a special session in May.* But 9 of 10 lawmakers who met with Jones said they can't take firm positions on Jones' plans because Jones has not yet come up with a Bill. *Courier-Journal,* April 21, 1993. Exhibit 32.

Z. On April 23, 1993, *Governor Jones unveiled his health care reform Bill [House Bill 1] and said he will call a special session on May 10.* The Bill [House Bill 1] in-

cludes universal coverage. *"Doctors, hospitals, and other providers would be taxed a percentage of their revenues; they would be prohibited from passing the tax onto consumers in higher charges. [sic] Courier-Journal,* April 24, 1993. Exhibit 33.

AA. An article in the *Courier-Journal,* dated April 27, 1993 states, "Although the Commission on Health Care reform was created by Jones to draft a health care reform package, it only briefly discussed Jones' Bill." *Courier-Journal,* April 27, 1993 (34). On May 5, 1993, Joe Clarke and others recommended delaying the session citing a lack of support for Jones' plan. *Courier-Journal,* May 6, 1993 (35). Exhibits 34 and 35.

BB. On May 7, 1993, *Governor Jones said he will favor Legislators who support his health care plan when he chooses park improvement projects.* The governor made his remarks after Representative Kenny Rapier said he heard reports that Jones is holding projects hostage for votes to pass his troubled health care bill. "If you get to the point where you've got 3 or 4 worthy projects and they're all deserving, and one is sponsored by someone who's for your bill, and the other three are sponsored by someone who's against your bill, which one are you going to go for?" Jones asked. "I'm going to go for the one that was for the bill, of course." *Courier-Journal,* May 8, 1993. Exhibit 36.

CC. A May 11, 1993 article in the *Courier-Journal* stated that Jones shows no backing off on his two main goals: controlling cost and providing immediate universal coverage. Legislative leaders say the state cannot afford immediate universal coverage, and many lawmakers dislike the proposed payroll tax. *Courier-Journal,* May 11, 1993. In the same article, *Jones said he would be the "lobbyist" for 450,000 uninsured Kentuckians,* and that he would provide insurance coverage to some by expanding Medicaid. "Everyone will have to make sacrifices to accomplish his goals", *[sic]*

said Jones, who specifically mentioned health care providers whom he wants to tax to help finance his reform plan. Those who have profited the most from this dollars-driven system must now, in fairness, be asked to give the most." *Courier-Journal,* May 11, 1993. Exhibit 37.

DD. On May 10, 1993, Governor Jones told lawmakers that he will compromise on "100 other issues", *[sic] but not on health care. Courier-Journal,* May 11, 1993. Exhibit 38.

EE. On May 11, 1993, Governor Jones disclosed his estimates of the cost of covering everyone under his bill. About half of the newly covered people would be added to the Medicaid rolls. *The additional cost would be paid by a tax on health care providers. Courier-Journal,* May 12, 1993. Exhibit 39.

FF. Articles from May 13, 1993 (40), May 14, 1993 (41), May 15, 1993 (42), May 17, 1993 (43), May 18, 1993 (44), and May 19, 1993 (45), reveal the interplay between a persistent Governor, pushing for universal coverage and cost-controls, and a Legislature that wouldn't agree with Governor Jones' plan for health reform. *Courier-Journal,* May 13-19, 1993. Exhibits 40-45. Finally, on May 20, 1993, the Special Session collapsed, but House Bill 1 passed. Representative Clarke said that the news that lawmakers had decided to call it quits was quite a shock to the Governor. "I don't think he saw it coming", *[sic]* Clarke said. "Jones repeatedly asked for a couple of days to reflect on this and make a counter proposal", *[sic]* said Senator Charles Berger. "We didn't have much of a discussion", *[sic]* said Senator Fred Bradley. "We had to say the same thing over and over, about 10 or 15 times." *In a later meeting, Jones salvaged a promise of another Special Session on Health Care later this year. Courier-Journal,* May 21, 1993 (46). Exhibits 40-46.

GG. Discussing the Special Session, the *Courier-Journal* related Jones' threats to hold lawmakers hos-

tage until Christmas Day, if necessary, to get his health plan passed. He talked tough about rewarding friends in the Legislature with projects in the $100 million Parks bond issue. *And he threatened in advance of May's Special Session to reconvene the Legislators, ad infinitum, if they sat on his health care initiative. Courier-Journal,* May 23, 1993. Exhibit 47.

HH. In an op-ed piece in the *Courier-Journal,* Governor Jones stated, "The campaign to reform health care in Kentucky is alive and well. To solve, this, the most crucial problem facing our state, first, we must get control of health care costs which are now spiraling out of control. Second, we must see that every Kentuckian has affordable health insurance coverage." *Courier-Journal,* June 20, 1993. Exhibit 48.

II. On June 18, 1993, when informed of a lawsuit planned by the KMA challenging the 2% provider tax, Governor Jones said, through a spokesman, that *he was disappointed by the KMA's decision and that when his goal of universal health insurance coverage is achieved, doctors will be paid for serving indigent people in excess of the 2% tax. Courier-Journal,* June 19, 1993. Exhibit 49.

JJ. Two leading state legislators express doubts on July 16, 1993, that Kentucky will enact health care reform legislation either this year or next year. "I just don't see it happening," said Senator Mike Moloney. Senator *[sic]* Joe Clarke said that expanding the number of Kentuckians who are covered by health insurance would take new state revenue. "I don't see us raising taxes in 1993 or 1994 to take care of health care or to balance the budget", *[sic]* said Clarke. *Courier-Journal,* July 17, 1993. Exhibit 50.

KK. Later in July in a television interview, Joe Clarke told viewers that lawmakers won't be ready for a Special Session "if the Governor takes the position that he has to have universal coverage within his term, that is not in the cards." *Courier-Journal,* July 27, 1993. Exhibit 51.

LL. Governor Jones, in early August, "accused House Speaker Joe Clarke of a flip-flop on the May agreement for saying in a July 18 broadcast interview that the General Assembly would not raise taxes to pay for universal health insurance coverage. *Jones said he plans to call the second Special Session by the end of the year, and the public will know who wants to solve the problem and who doesn't."* Clarke responded saying, "There wasn't any commitment made to any specific package or any specific solution. I had been telling him (Jones) all along there was no support for a tax increase, and that hasn't changed, and he knew that." Jones insisted in an interview that he still considers health care the "most important single issue facing the Commonwealth". *[sic] Courier-Journal,* August 6, 1993. Exhibit 52.

MM. On August 6, 1993, House members indicated that they are willing to enact health care legislation, but they agreed that a tax increase to extend health insurance to all Kentuckians is not feasible in the near future. *Courier-Journal,* August 7, 1993. Exhibit 53.

NN. Finally, on August 12, 1993, Governor Jones said that he's given up pushing for passage of universal health care coverage in a Special Session that could be held in October. Jones said he still wanted universal coverage, "but I think the reality of the situation is telling all of us that it's not going to be done immediately. I have not changed my goal of getting universal coverage as quickly as possible." Jones said he expects the coverage to be phased in beginning with "where the greatest need is and where you can get the greatest return for the dollars invested." He said he would not seek a tax increase in the Special Session. Jones said "that people will be surprised by how quickly universal coverage can be attained." *Courier-Journal,* August 13, 1993. Exhibit 54.

OO. In a report on the Health Task Force dated October 9, 1993, *Governor Jones again stated his de-*

sire for a special session before the end of the year. Jones said he wants the state to set aside any savings it receives in the health care funds in a special trust fund that would be used to extend coverage to the poor. *Courier-Journal,* October 9, 1993. Exhibit 55.

PP. On November 16, 1993, Governor Jones said his plan for universal coverage at controlled cost was stalled by Legislative inaction and "a lot of people making a lot of money who don't want the system to change." *Courier-Journal,* November 17, 1993. Exhibit 56.

QQ. On December 9, 1993, Governor Jones announced that Health and Human Services Secretary Donna Shalala had approved Kentucky's five-year pilot project, which will start July 1. Kentucky can dramatically expand its medicaid program to cover everyone living under the poverty line. This expands health insurance coverage to another 201,000 children and adults. Jones said the plan would still leave an estimated 200,000 to 230,000 Kentuckians without insurance, but would be a major step toward universal insurance coverage. *Jones acknowledged that the Medicaid expansion depends upon the outcome of the court case* (the 2% provider tax on appeal), *but he said he believed the Supreme Court would issue a ruling quickly. Courier-Journal,* December 10, 1993. Exhibit 57.

RR. In mid-December, three Supreme Court Justices, Leibson, Spain and Lambert, disqualified themselves from hearing the appeal of my lawsuit, because of conflict of interest concerns. *Courier-Journal,* January 7, 1994. Exhibit 58.

SS. On January 6, 1994, Governor Jones named three Special Justices to the Kentucky Supreme Court for the appeal involving the health care provider tax: Sheryl G. Snyder of Louisville, Ben S. Fletcher III of Hopkinsville, and Stephen C. Cawood of Pineville. *Courier-Journal,* January 7, 1994. Exhibit 59.

TT. Even after the appointment of the three (3) Special Justices, Governor Jones, in his State of the Commonwealth address, stated:

"A *centerpiece* to the health care financing issue and to the state budget is, of course, the *retention of the provider tax. We must collect this amount of money,* have it more than tripled in Washington, and give it to providers to pay for the health care of thousands of Kentuckians."

Courier-Journal, January 25, 1993; Lexington *Herald-Leader,* January 25, 1993.

4. The foregoing chronology documents that Governor Jones has been, and continues to be, the principal political figure in Kentucky pushing for health reform. Health care reform is "his number one priority", *[sic]* and he has staked all of his "political capital" on accomplishing his two chief goals of health reform: (1) universal insurance coverage for all Kentuckians; and, (2) cost containment.

5. He has relentlessly pushed for universal coverage against a reluctant Legislature, a Legislature that has been bound by budgetary restrains, *[sic]* and the almost unanimous opinion of all Legislators that the enactment of any new general tax measures would be impolitic. The Governor, in the span of several months, has presented various means of trying to accomplish immediate universal health insurance coverage, but has failed to convince the Legislature to enact his comprehensive plans, because of their aversion to any general tax measure.

6. In trying to devise plans for providing insurance coverage for the approximately 450,000 uninsured Kentuckians, the Governor has consistently (in every plan he has presented) relied on the expansion of the Medicaid program to cover those below the federal poverty line, but not currently covered by Medicaid. This encompasses approximately 200,000 so-called uninsured Kentuckians, about one-half of the total so-called uninsured in Kentucky. In each plan, the 2% provider tax was proposed as the revenue measure to provide funding for this Medicaid expan-

sion, a tax on 6,000 physicians, rather than any general tax measure. Then the Governor's plan, when published in the Spring of 1993, stated that the 2% tax on providers' gross revenues could not be passed through to the public by raising fees. This step of making a pass-through of the tax illegal, was the creation of the Governor and first appeared in his House Bill 1.

7. In the Special Session on Health Care in May of 1993, the Governor failed to enact his reform plan. He succeeded in gaining the passage of House Bill 1, which expanded the 2% provider tax to all health care providers, and he was able to have the non-pass-through provision of the tax enacted into law.

8. Subsequent to the failure of the Special Session on Health Care Reform and the Task Force activities of the summer of 1993, Governor Jones was forced to accept the fact that the Legislature was not going to enact universal health insurance for all Kentuckians.

9. Governor Jones, still maintaining that health reform was his number one priority, subsequently decided he would have to phase-in universal coverage. He then applied for, and was granted, a waiver from the federal government to expand Medicaid by 201,000 people. The funding for this expansion of Medicaid was to be, in part, provided by the 2% provider tax.

10. Acknowledging that his plan to expand Medicaid is contingent on continuation of the provider tax, Governor Jones in mid-December was faced with the recusal of 3 of the 7 Supreme Court Justices in his appeal of Judge Crittenden's adverse decision.

11. In naming Sheryl G. Snyder, an executive of ICH Corporation, as a Special Justice, Governor Jones ignores (or knows and understands) the fact that ICH has a contract with the state awarded by the Executive Branch that has paid ICH over 16 million dollars since 1988; ignores (or knows and understands) that ICH donated $5,000 to his inauguration celebration; and (or knows and under-

stands) ignores the fact that Stephen L. Miller, his ex-aide and ex-Campaign Manager, and Miller's law partner, James H. Newberry, Jr., represent ICH. James Newberry also chaired the Governor's Task Force on Health Care Access and Affordability. *Courier-Journal,* March 12, 1992 (7), August 21, 1992 (60), November 15, 1991 (61), March 26, 1992 (62), and January 18, 1992 (63); 8 *1994 Martindale-Hubble Law Directory,* KY 109B-KY 110B (64). See also: *Exhibits 7, 60, 61, 62, 63 and 64.*

12. Governor Jones is a party in interest in the above-styled case; he has an interest in its outcome. This Affiant's success in the case would jeopardize his stated goals. By naming the three (3) Special Justices, Governor Jones is denying this Affiant's right to a fair and impartial hearing in Court.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Stuart G. Yeoman MD
STUART G. YEOMAN, M.D.

STATE OF KENTUCKY }
COUNTY OF }

SUBSCRIBED AND SWORN to before me by STUART G. YEOMAN, M.D., on this the 28 day of January, 1993 *[sic].*

My Commission Expires: 4-3-97.

/s/ Patricia Trotter
NOTARY PUBLIC
KENTUCKY, STATE AT LARGE

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SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY,
REVENUE CABINET; ET AL., - - - - - - MOVANTS

On Appeal From Franklin Circuit Court
Honorable Roger Crittenden, Judge
93-CI-959

v.

CHARLES C. SMITH, JR., M.D.; ET AL., - - RESPONDENTS

To Be Heard With:

93-SC-944-TG

COMMONWEALTH OF KENTUCKY,
REVENUE CABINET; ET AL., - - - - - - MOVANTS

On Appeal From Franklin Circuit Court
Honorable Roger Crittenden, Judge
93-CI-1275

v.

HEALTH MAINTENANCE ORGANIZATION
ASSOCIATION OF KENTUCKY, INC., ET AL., - RESPONDENTS

ORDER GRANTING INTERMEDIATE RELIEF PURSUANT TO CR 76.33

These cases are before the undersigned pursuant to CR 76.33. Movants have requested a stay of the final judgment/order of the Franklin Circuit Court, pending a decision on the merits by this Court.

Respondents, successfully, in the Franklin Circuit Court challenged the constitutionality of House Bill 1 (Special Session, 1993) which imposed a tax on physicians' services and health maintenance organizations' services. The pro-

ceeds of the tax were earmarked to obtain federal matching money to support Kentucky's extensive Medicaid program.

In the judgment, the trial court, *inter alia,* permanently enjoined the movant Revenue Cabinet from collecting any more taxes under the provisions of HB 1, and ordered the Revenue Cabinet to remit refunds on "taxes already paid" within 90 days of the order. The emphasis of the present motion deals with these two provisions.

Transfer of this case has been granted. By separate order this day, an abbreviated briefing schedule has been designated, and oral argument has been set for February 17, 1994.

For a temporary stay to be granted, the movants must show a possibility of success on the merits of the appeal and must also show that a failure to grant the stay will cause irreparable damage to them.

The basic legal question presented in the underlying case involves the right of the Kentucky General Assembly to establish the classification set out in HB 1, for taxation purposes, under the proscriptions of Sections 59 and 2 of the Kentucky Constitution. The undersigned believes that there is a strong possibility of success on appeal to this Court. Thus, at least in the opinion of the undersigned, the first requirement of CR 76.33 is satisfied.

The question of irreparable injury to the Commonwealth and to the recipients of Medicaid benefits and other clients served by the movants, Cabinet for Human Resources (CHR), is more difficult. It is clear from argument of counsel that if the collection of the tax is stopped, that at least 10% of the so-called "matching funds" (presumably for the next taxing period) will be withdrawn. It is also clear that the amount of money involved is at least 12 Million Dollars and the maximum amount of money is 25 Million Dollars. Although the federal matching funds would not be *immediately* withdrawn (due to the provision of a bureaucratic hearing process) they could be in serious jeopardy at a later time. It is also clear that if CHR was

without the federal matching money, other scarce resources of CHR would have to be used to continue Medicaid services to Kentucky citizens. In any case, it seems to the undersigned that unless CHR reallocates its present resources from currently provided social services, the Kentucky Medicaid program would suffer an immediate loss of 10% (12 Million Dollars or 25 Million Dollars) and that many Kentuckians would suffer a decrease or loss of health care benefits. Clearly this constitutes irreparable damage to the citizens of Kentucky who depend on Medicaid for their health care.

In addition, during argument on the CR 76.33 motion, counsel for certain respondents conceded that they have no basic objection to staying the portion of the order of the Franklin Circuit Court that ordered refunds to be made to their clients within 90 days of the entry of that order. Such time frame is unworkable as the matter is currently on appeal and is not final until a final ruling by this Court is entered.

The motion for relief pursuant to CR 76.33 is granted, and the judgment/order of the Franklin Circuit Court dated November 23, 1993, is stayed pending the final decision of this Court.

ENTERED: December 21, 1993

/s/ Robert F. Stephens
Chief Justice